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## Non-Judicial Precedent

Michael J. Gerhardt

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# Non-Judicial Precedent

*Michael J. Gerhardt\**

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INTRODUCTION

This Article proposes a new paradigm for analyzing the role of precedent in constitutional law. The conventional perspective equates precedent with judicial decisions, particularly those of the Supreme

Court,<sup>1</sup> and almost totally ignores the constitutional significance of precedents made by public authorities other than courts.<sup>2</sup> Yet, non-judicial actors produce precedents that are more pervasive than those made by courts in constitutional law. Non-judicial precedents are not only confined to the backwaters of constitutional law, but they also pertain to serious constitutional matters—presidential succession, secession, congressional power to remove Presidents and Justices, and the respective authorities of the President and Congress to regulate war, just to name a few.

By reenvisioning constitutional law through the lens of non-judicial precedent, this Article develops several new insights into constitutional law generally and precedent in particular. First, shifting perspective improves the precision and clarity of the terms we employ in constitutional analysis. I define non-judicial precedents as any past constitutional judgments of non-judicial actors that courts or other public authorities imbue with normative authority. Once we understand non-judicial precedents in this way, they are more recognizable, and, in turn, their constitutional significance is more apparent.

Second, shifting our perspective from that of the courts to that of other actors illuminates the considerable influence of non-judicial precedents in constitutional law. The Supreme Court is shaped by non-judicial precedents on its size, composition, jurisdiction, and funding; these non-judicial precedents take such diverse forms as administrative and historical practices, tradition, norms, culture, and

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1. See, e.g., BLACK'S LAW DICTIONARY 1214 (8th ed. 2004) (defining precedent as either "[t]he making of law by a court in recognizing and applying new rules while administering justice" or "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues"). For social scientists' understandings of precedent, see, e.g., THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 5 (2006) (defining precedent as "the legal doctrines, principles, or rules established by prior court opinions").

2. The few legal scholars who take non-judicial decisionmaking seriously do not analyze it comprehensively or in concrete, easily measurable forms such as precedent. See, e.g., Robert C. Post, *The Supreme Court, 2002 Term, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8-11 (2003) (defining "culture" as "the beliefs of non-judicial actors" that influenced recent Supreme Court decisions on the scope of the Congress's power under Section Five of the Fourteenth Amendment); Mark V. Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453, 455 (2003) (comparing how non-judicial review of constitutional questions works here and abroad); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 780 (2002) (arguing that theories of judicial supremacy improperly discount the significance of extrajudicial constitutional interpretation).

custom.<sup>3</sup> On constitutional matters that courts never review, non-judicial precedents are the dominant currency.

Third, appreciating the constitutional significance of non-judicial precedents is instrumental to solving prominent debates among theorists (and public officials) about judicial supremacy,<sup>4</sup> the "counter-majoritarian difficulty,"<sup>5</sup> and imperfect or incomplete implementation of constitutional values. Missing in these debates is a positive account of non-judicial precedents that emphasizes their pervasiveness and power in constitutional law.

This Article proceeds as follows. Part I examines the one characteristic which all non-judicial precedents share: their discoverability—the culmination of public efforts made to invest certain past non-judicial activities with normative force. To illustrate the essential importance of discoverability, I contrast three cases in which it is easy to spot non-judicial precedents with three in which it is difficult, if not impossible, to claim non-judicial activities as precedents.

Part II examines several other features distinguishing non-judicial precedents from each other and from judicial precedents. First, there is a remarkable range and variety of non-judicial precedents. They extend over a much broader range of constitutional issues than do judicial precedents and may be categorized in many different ways. They differ in terms of the institutions producing them, the forms they take, and the different authorities for their construction. A second distinctive feature of non-judicial precedents is their timing. Frequently, they pre-exist judicially created constitutional doctrine and thus govern and shape particular constitutional matters unless or until they are addressed by courts. Third, non-judicial precedents are surprisingly enduring. Very few of the constitutional judgments of non-judicial authorities are subject to judicial review. Courts not only uphold an overwhelming number of

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3. See generally KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

4. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting) (deriding the "arrogance" of the majority, and accusing it of using its own judgment to reach its ruling that the Eighth Amendment bars executions of people with cognitive disabilities found guilty of certain crimes); Samuel Issacharoff, *Political Judgments*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT 55, 57 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (describing the *Bush v. Gore* Court's intervention as "swaggeringly confident"); Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170, 288 (2001) (claiming that "[t]he Court's self-confidence in matters constitutional is matched only by its disdain for the meaningful participation of other actors in constitutional debate").

5. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (2d ed. 1986).

non-judicial activities they review, but they also defer to non-judicial precedents in various forms, such as historical practices, traditions, and customs. The fourth distinctive feature of non-judicial precedents is their design or the direction of their influence. Because of their design, non-judicial precedents may impact public institutions in various ways. They may be designed to operate vertically—as a binding mandate imposed by a superior authority on an inferior one—or horizontally—as persuasive authority across public institutions. A final distinctive feature of non-judicial precedents is their limited path dependency. Despite their easy discoverability, non-judicial precedents have a limited capacity to foreclose or maintain certain choices or outcomes<sup>6</sup> because of their forms and the purposes for which they have been created or cited.

Part III examines the multiple functions of non-judicial precedents, besides their role as binding or persuasive authority.<sup>7</sup> These functions include settling legal disputes, serving as modes of constitutional argumentation, facilitating national dialogues on constitutional law, stabilizing or achieving equilibrium in constitutional law, and shaping national identity, judicial doctrine, and constitutional culture and history. The more often precedents are cited approvingly, the more their meaning and value increase. The citation patterns of judicial and non-judicial precedents are interconnected, as their meaning and value often depend on the frequency with which they are cited positively by courts and non-judicial authorities.

The final Part examines the normative implications of my positive account of non-judicial precedent. First, the multiple functions of non-judicial precedents largely expose the exaggeration of the counter-majoritarian difficulty in constitutional theory because most of the Court's constitutional decisions are grounded in some expression of *majoritarian* preferences—custom, tradition, historical practices, the text of the Constitution, or judicial precedent (as approved by most Justices over time). Judicial precedents conflicting with non-judicial precedents are the most vulnerable to political attacks. Second, non-judicial precedents are instrumental to implementing constitutional values. Incomplete, or imperfect, implementation of constitutional values results from tensions among

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6. See generally Paul A. David, *Historical Economics in the Longrun: Some Implications of Path-Dependence*, in *HISTORICAL ANALYSIS IN ECONOMICS* 29, 29 (Graeme Donald Snooks ed., 1993) (describing path dependency as the inability to “shake off the effects of past events”).

7. On the multiple functions of judicial precedents, see Michael J. Gerhardt, *Attitudes about Attitudes*, 101 MICH. L. REV. 1733, 1761-62 (2003) (reviewing H. SPAETH & J. SEGAL, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002)).

non-judicial precedents or between judicial and non-judicial decisions. Third, the proliferation and endurance of non-judicial precedents contradict claims of judicial supremacy. Not only do courts heavily depend on (and defer to) non-judicial precedents, but the domain of non-judicial activities that elude judicial review dwarfs that of judicial precedents. When one further recognizes that non-judicial precedents settle many constitutional conflicts as important as—if not more important than—those settled by judicial precedents, it is apparent that judicial supremacy is not a fact of our constitutional life.

The Article concludes by arguing that a shift in perspective from the Court to non-judicial actors allows us to see constitutional law in new ways. It illuminates the connections among constitutional activities, which seem to have little in common, but in fact are connected by non-judicial precedent—events ranging from the seemingly mundane to the monumental. These events illustrate why non-judicial actors, not the Court, are supreme in making constitutional law.

#### I. DISCOVERABILITY AS THE COMMON FEATURE OF NON-JUDICIAL PRECEDENTS

Not every non-judicial activity qualifies as a precedent. When, for instance, George Washington acknowledged that, as the nation's first President, "[t]here is scarcely any part of my conduct which may not hereafter be drawn into precedent,"<sup>8</sup> it seems improbable that *everything* he did should count as a precedent. Surely, what he ate for breakfast and how long he slept are not precedents, but why not? Similarly, when then-Representative Bob Barr declared that "the precedents we set in [the Clinton impeachment proceedings] will remain part and parcel of our legal system for years to come,"<sup>9</sup> it is doubtful *everything* done in those proceedings has precedential value. Some events, but not others, comprise precedents—but which ones? It is reasonable to resist adopting a notion of non-judicial precedent so capacious that it counts every non-judicial activity as a precedent, as this would deprive the concept of any meaning or manageability.

While all non-judicial activities have the potential to become precedents, only those non-judicial activities that are *discoverable* count as precedents. It is discoverability—the culmination of public

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8. Letter from George Washington to Catherine Macauley Graham (Jan. 9, 1790), in 30 THE WRITINGS OF GEORGE WASHINGTON, FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 495, 496 (John C. Fitzpatrick ed., 1939).

9. *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998) (statement of Rep. Barr).

efforts to invest certain non-judicial activities with normative force—that transforms non-judicial activities into precedents. These efforts may be undertaken at any time—when non-judicial activities first take place or later. Public efforts to empower non-judicial acts with normative authority make these acts discoverable, and their discoverability makes them recognizable as precedents. Thus, it is impossible for something that is not discoverable to become a precedent, as no one knows about it, much less has tried to invest it with normative power. What President Washington ate for breakfast is not a precedent because neither he nor anyone else tried to imbue it with special authority. Similarly, in the Clinton impeachment proceedings, only those things that public authorities then or later tried to invest with normative power constitute precedents. Thus, discoverability is a useful means to separate non-judicial activities that count as precedents from those that do not.

The discoverability of non-judicial precedents is a consequence of their network effects.<sup>10</sup> The normative authority of non-judicial activities, just like that of judicial precedents, is linked to the frequency with which they are cited. The more often that public authorities, including courts, cite or seek to invest past non-judicial activities with normative power, the more discoverable the activities become, and the more their meaning and value increase. Because not all non-judicial authorities employ the same citation practices or feel the same compulsion as courts to explain their decisions through reasoned elaboration, it is not surprising that some non-judicial activities are harder to find than others. In the next two Sections, I illustrate how frequency of citation and other public efforts to invest certain non-judicial activities with normative force differentiate the cases in which non-judicial precedents are easily identified from those in which they are not.

### A. *Three Easy Cases*

In this Section, I discuss three easily discoverable non-judicial precedents. These precedents are easy to spot because of repetition, formal codification, and consistent, longstanding public recognition and construction.

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10. On network effects, see generally Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting* (Or, “*The Economics of Boilerplate*”), 83 VA. L. REV. 713 (1997); Mark A. Lemley & David McGowan, *Legal Implications of Economic Network Effects*, 86 CAL. L. REV. 479 (1998).



## 1. Vice Presidential Succession to the Presidency

When President William Henry Harrison died a month after his inauguration,<sup>11</sup> the legal status of Vice President John Tyler was in doubt. Because Harrison was the first President to die in office, there was no precedent to guide Tyler or the nation.<sup>12</sup> Nor was there any consensus on how the constitutional provision governing presidential succession should be construed.<sup>13</sup> The pertinent provision was notoriously ambiguous:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.<sup>14</sup>

The question was whether “the same” referred to the office of the presidency or to the President’s particular powers and duties. Prominent authorities had divided over whether a Vice President automatically should become President and continue as such until the expiration of the term or that a Vice President could only *act* as President upon a sitting President’s death, having no entitlement to claim the office for himself because he had not been formally elected President.<sup>15</sup>

Because Tyler was home in Williamsburg, Virginia when Harrison died, the cabinet and congressional leaders had at least a day to ponder his constitutional status before he returned to the nation’s capital.<sup>16</sup> Henry Clay, the Whig leader in the Senate, initially believed that the powers and duties of the office of the presidency, but not the office itself, devolved on Tyler.<sup>17</sup> Harrison’s cabinet agreed with Clay and addressed Tyler as Vice President in its first contact with him following Harrison’s death.<sup>18</sup> Just before Tyler arrived in Washington, D.C., Secretary of State Daniel Webster had asked the

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11. EDWARD P. CRAPOL, *JOHN TYLER: THE ACCIDENTAL PRESIDENT* 8 (2006).

12. NORMA LOIS PETERSON, *THE PRESIDENCIES OF WILLIAM HENRY HARRISON AND JOHN TYLER* 41-42 (1989).

13. *See id.* at 45-47 (describing various proposed constructions, and noting that “by 1841 no conclusion had been reached”).

14. U.S. CONST. art. II, § 1, cl. 6, *amended by* U.S. CONST. amend. XXV.

15. *See* RUTH C. SILVA, *PRESIDENTIAL SUCCESSION* 38-41 (1951) (discussing the different positions taken before 1841 by prominent authorities such as Joseph Story, William Rawle, and James Kent on a vice-president’s constitutional status upon the death of a sitting president).

16. *See* CRAPOL, *supra* note 11, at 8-10 (noting that it took Tyler twenty-four hours to make the trip to Washington).

17. *See* SILVA, *supra* note 15, at 21.

18. *See id.* at 16.

clerk of the Supreme Court to relay a message requesting Chief Justice Roger Taney's counsel on the proper constitutional procedure, but Taney demurred.<sup>19</sup>

Tyler arrived in Washington on April 6, 1841, with a well-conceived strategy in mind.<sup>20</sup> His first order of business was to meet with the six members of Harrison's cabinet. He believed, and likely told the Cabinet members unequivocally that he believed, that the office of the presidency and all its power and duties fully devolved on him at the moment of Harrison's death.<sup>21</sup> When Webster mentioned Harrison's custom of making decisions on the basis of a majority vote of his cabinet, Tyler rejected the practice because he did not believe that cabinet members were co-equal with the President.<sup>22</sup> Tyler vowed that he "would never consent to being dictated to" by his cabinet.<sup>23</sup> By the end of the meeting, the cabinet agreed to recognize Tyler as the duly authorized President of the United States.<sup>24</sup>

Tyler's next step was to take a public oath to certify his claim to the presidency.<sup>25</sup> Although Tyler believed his succession was automatic, he agreed to take the oath of office with the entire cabinet present at the persistent urging of the presiding judge, William Cranch of the Circuit Court of the District of Columbia.<sup>26</sup> Cranch believed that the new oath was necessary to dispel any doubts about the legality of Tyler's status.<sup>27</sup> Cranch appended a statement of his beliefs to the copy of the oath he administered to Tyler, along with Tyler's objection.<sup>28</sup> Three days later, Tyler delivered an inaugural address in which he explained why he believed he had succeeded to the presidency and referred to himself several times as "Chief Magistrate" and "President."<sup>29</sup> Almost immediately thereafter, Tyler moved into the White House, called for a public day of prayer and fasting to honor Harrison's memory, and met with several foreign

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19. PETERSON, *supra* note 12, at 47.

20. CRAPOL, *supra* note 11, at 10.

21. See *id.* (discussing "Tyler's unwavering certainty that he was now the nation's president" and his "unexpected decisiveness" in the Cabinet meeting).

22. *Id.*

23. *Id.*

24. See *id.* ("[T]he entire cabinet agreed to his stipulations and remained on board to serve their new chief.").

25. *Id.*

26. *Id.*

27. *Id.*

28. PETERSON, *supra* note 12, at 48.

29. John Tyler, Inaugural Address (Apr. 9, 1861), in 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 36-39 (James D. Richardson ed., 1897).

ministers to allay international concerns about the lawfulness of the power transfer.<sup>30</sup>

Nevertheless, some doubts persisted in Congress, in part because the Whigs and Democrats were confused about where Tyler stood on the great constitutional issues of the day.<sup>31</sup> A little less than two months after Tyler took the presidential oath, Congress held a special session in which it formally addressed Tyler's status.<sup>32</sup> On May 31, 1841, Representative Henry Wise of Virginia proposed a resolution referring to Tyler as the President of the United States.<sup>33</sup> After a heated exchange, the resolution passed without any change in wording.<sup>34</sup> Ohio's two senators led a protest against Tyler's succession on the following day.<sup>35</sup> After some debate, the Senate voted 38-8 to recognize Tyler as the President.<sup>36</sup> This generally settled the matter, although some people, including John Quincy Adams, persisted in calling Tyler "Acting President,"<sup>37</sup> and others called him "His Accidency."<sup>38</sup> Even near the end of Tyler's presidency, some detractors continued to address letters to Tyler as "Vice-President-Acting President," and he routinely returned them unopened.<sup>39</sup>

Tyler's succession to the presidency became a precedent because of the concerted efforts of Tyler and other national leaders to make it one. They knew that people facing the same circumstances in the future would seek guidance from what Tyler did immediately after Harrison's death; thus, they took great pains to construct a precedent that would withstand the test of time.<sup>40</sup> After Tyler left office, seven

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30. CRAPOL, *supra* note 11, at 12-13.

31. See *id.* at 18-19 (describing Tyler's refusal to go along with various Whig initiatives); YANEK MIECZKOWSKI, THE ROUTLEDGE HISTORICAL ATLAS OF PRESIDENTIAL ELECTIONS 39 (2001) (noting that Tyler had been a Democrat originally, but had switched over to the Whig party on account of President Jackson's Bank veto); SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 524-26 (2005) (describing significant clashes between Whig leader Henry Clay and President Tyler).

32. SILVA, *supra* note 15, at 22.

33. PETERSON, *supra* note 12, at 49.

34. *Id.* at 50.

35. *Id.*

36. *Id.*

37. CRAPOL, *supra* note 11, at 10.

38. PETERSON, *supra* note 12, at 50.

39. CRAPOL, *supra* note 11, at 10.

40. See *id.* at 16 (noting that Tyler justified his actions as a "demonstrat[ion] to the nation and the world that American constitutional procedures for a peaceful transfer of executive power worked").

Vice Presidents followed Tyler's example.<sup>41</sup> The repetition reinforced Tyler's succession as a precedent, and, in 1967, Tyler's precedent was officially codified with the adoption of the Twenty-fifth Amendment.<sup>42</sup> In the only application of this amendment, Gerald Ford became President when Richard Nixon resigned from office in 1974.

## 2. Presidential Signing Statements

While President George W. Bush's signing statements have been controversial,<sup>43</sup> their status as non-judicial precedents is easy to establish. In the course of exercising their constitutional authority to "sign" bills into law<sup>44</sup> and fulfilling their constitutional oath, Presidents, beginning with James Monroe, have exercised the prerogative to issue public statements along with their signatures on bills.<sup>45</sup> The commonality of signing statements intensified with President Reagan who issued 250 of them, eighty-six of which contained provisions questioning the constitutionality of one or more of the statutory provisions signed into law.<sup>46</sup> President George H.W. Bush issued 228 signing statements, 107 of which raised constitutional objections.<sup>47</sup> President Clinton issued 381 signing statements, seventy of which raised constitutional concerns or objectives.<sup>48</sup> While President George W. Bush has rendered 152 signing statements as of the beginning of August 2007, 118 of these—the largest percentage of any President's—contain constitutional challenges or objections to more than 1,000 statutory provisions.<sup>49</sup>

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41. The seven other vice-presidents who succeeded to the presidency are Millard Fillmore (1850), Andrew Johnson (1865), Chester Arthur (1881), Theodore Roosevelt (1901), Calvin Coolidge (1923), Harry Truman (1945), and Lyndon Johnson (1963).

42. See U.S. CONST. amend. XXV, § 1 ("In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.").

43. See, e.g., Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1 (discussing legal scholars' and Congress's responses to Bush's use of signing statements and assertion of power).

44. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . .").

45. T.J. HALSTEAD, CONG. RESEARCH SERV., PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 2 (2007).

46. See *id.* at 3.

47. See *id.* at 5.

48. See *id.* at 6.

49. *Id.* at 9; see also *Morning Edition: House Studies Impact of Bush "Signing Statements"* (NPR radio broadcast Feb. 1, 2007), available at 2007 WLNR 1948387 (providing slightly different numbers, current through February 2007: 126 signing statements, posing constitutional challenges or objections to more than 800 statutory provisions).

Many of these signing statements have provoked criticism in the media and Congress.<sup>50</sup> An American Bar Association Commission issued a report protesting that the signing statements were unlawful presidential attempts to create legislative history, to extend the scope of the President's power beyond its limits, or to refuse to enforce laws that he should have been obliged to enforce because he had signed them.<sup>51</sup>

The controversy over signing statements does not necessarily diminish them as precedents. To the contrary, the controversy merely has called more public attention to them and thus has made them more discoverable. The discoverability of presidential signing statements as precedents turns on Presidents' public efforts to assert them as presidential prerogative, to use them to send signals or to bind executive officials, and to get others to accept their legitimacy. As long as the opinions expressed in signing statements are just opinions, their only legal significance is as persuasive authority to Congress, executive officials, states, and subsequent Presidents. Efforts to implement the opinions—for instance, through vetoes or executive orders—are acts separate from signing the statements, and they have different legal force and consequences than the opinions expressed in the statements.

### 3. The Non-Impeachability of Members of Congress

Another easy non-judicial precedent to spot is the first federal impeachment. On July 7, 1797, the House of Representatives impeached former Senator William Blount, a Tennessee Federalist.<sup>52</sup> The House impeached Blount based on evidence provided by President John Adams that Blount had attempted to help the British capture Spanish-controlled Florida and Louisiana by inciting Creek and Cherokee Indians to attack the Spanish settlers there.<sup>53</sup> The House

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50. See, e.g., *Morning Edition: House Studies Impact of Bush "Signing Statements,"* *supra* note 49 (discussing Congressional concern over Bush's actions).

51. See HALSTEAD, *supra* note 45, at 1 (quoting the ABA report's criticisms of Bush's use of signing statements). For a discussion on Bush's reasoning for using signing statements, see Philip J. Cooper, *George W. Bush, Edgar Allan Poe and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 522 (2005) (characterizing the constitutional objections raised by President Bush as falling across seventeen categories, ranging from generalized assertions of presidential authority to supervise the "unitary executive branch" to federalism limits imposed on Congress by the Supreme Court).

52. See 7 ANNALS OF CONG. 459 (1797); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 275-81 (1997); BUCKNER F. MELTON, JR., *THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT* 116-20 (1998).

53. See MELTON, *supra* note 52, at 89-120; CURRIE, *supra* note 52, at 275-76.

principally charged Blount with engaging in a conspiracy to compromise the neutrality of the United States in flagrant disregard of the Constitution's distribution of authority over foreign affairs.<sup>54</sup> The next day the Senate expelled Blount by a vote of 25-1.<sup>55</sup> When the Senate began its impeachment trial against Blount several months later, Blount's lawyers challenged the Senate's jurisdiction on three grounds.<sup>56</sup> First, they argued that because Blount was no longer a senator, the Senate no longer had jurisdiction to convict, remove, or disqualify him.<sup>57</sup> Second, they argued that senators were not impeachable, because only "civil officers of the United States" were impeachable<sup>58</sup> and that senators were not "civil officers of the United States."<sup>59</sup> Third, they argued that because his misconduct was strictly personal and involved no abuse of official powers, it did not provide the proper basis for his impeachment, much less his removal and disqualification.<sup>60</sup> On January 10, 1798, the Senate voted 14-11 to defeat a resolution declaring that Blount was a "civil officer" and therefore subject to impeachment.<sup>61</sup> On January 11, 1798, the Senate voted, by the same margin, to dismiss the impeachment articles against Blount because he no longer held office and, on January 14, 1798, again voted 14-11 to dismiss the impeachment resolution against Blount for lack of jurisdiction.<sup>62</sup>

Public authorities and commentators then and since have construed the first basis on which the Senate voted to dismiss Blount's impeachment—that members of Congress are not impeachable—as the most significant.<sup>63</sup> While the Senate's vote dismissing jurisdiction over Blount's impeachment bound the Senate and other public authorities at the time, members of Congress and most scholars then and since have maintained its significance as precedent. Until senators rule differently on whether members of Congress are

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54. See MELTON, *supra* note 52, at 156.

55. *Id.* at 125-26.

56. CURRIE, *supra* note 52, at 277.

57. *Id.*; MELTON, *supra* note 52, at 207.

58. See U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

59. CURRIE, *supra* note 52, at 277; MELTON, *supra* note 52, at 207.

60. CURRIE, *supra* note 52, at 277; MELTON, *supra* note 52, at 207.

61. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 48 (2d ed. 2000).

62. MELTON, *supra* note 52, at 232.

63. See, e.g., CURRIE, *supra* note 52, at 281 (referring to "Blount's case . . . [a]s commonly cited to have established" the "proposition" that "members of Congress are not 'officers of the United States.'" (citations omitted)).

impeachable,<sup>64</sup> Blount's acquittal stands as the first and only precedent on the impeachability of members of Congress.

### *B. The Hard Cases*

In this Section, I discuss three cases in which it is difficult, if not impossible, to claim non-judicial activities as precedents. These cases illustrate the problems with discovering precedents when there are deficient historical records, conflicting precedents, or no supporting network of citations.

#### 1. Presidential Censure: The Problem of Incomplete or Conflicting Records

Censure—a resolution condemning presidential conduct by the House or Senate—is typical of non-judicial activities that are hard to characterize as precedents because of three problems with the historical record. First, the Senate expunged the only resolution that it has formally characterized as the censure of a President. In 1834, President Jackson instructed Acting Treasury Secretary Roger Taney to remove deposits from the National Bank and place them in state banks.<sup>65</sup> Jackson believed the National Bank was corrupt and anti-democratic, while his critics, led by Henry Clay in the Senate, believed that the order was illegal.<sup>66</sup> In response to Jackson's refusal to share with the Senate a copy of a message that he had read to his cabinet on the subject, Clay proposed a formal resolution censuring Jackson for assuming power not conferred by the Constitution.<sup>67</sup> After a ten-week debate, the Senate approved the resolution by a vote of 26-20.<sup>68</sup> Jackson responded publicly in two formal protests that questioned the constitutionality of the censure resolution, but which the Senate refused to allow into the Congressional Record.<sup>69</sup> Two years later, after

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64. Blount's lawyers argued that expulsion was the exclusive remedy for sanctioning the misconduct of members of Congress and that it was absurd to construe the Constitution as allowing two modes for removing senators, particularly since expulsion is easier to accomplish than removal, as the former depends only on the Senate's judgment. *Id.* at 279-80. In response, the House Managers stressed that the two procedures were not in tension with each other, because the impeachment process allows for one sanction that expulsion does not—disqualification. *Id.* While this latter argument is reasonable, neither representatives nor senators have shown any interest in revisiting the impeachability of members of Congress.

65. See WILENTZ, *supra* note 31, at 394-95.

66. See *id.* at 392-95, 398.

67. *Id.* at 398-99.

68. PETERSON, *supra* note 12, at 14.

69. Andrew Jackson, U.S. President, Message of Protest to Senate (Apr. 15, 1834), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 69-93 (James D.

Jackson had succeeded in helping to elect a slim Democratic majority in the Senate, the Senate expunged the resolution pursuant to a motion by Senator Thomas Hart Benton.<sup>70</sup> Thus, it is difficult to claim a specific precedent clearly supporting the constitutionality of presidential censure resolutions. The Senate formally repudiated the only possible precedent for censure and arguably reinforced this judgment by later refusing to censure President Clinton.<sup>71</sup>

The second problem with establishing a precedent for censuring Presidents is the fact that resolutions criticizing Presidents and other public figures have not been called censures. The House and Senate both have passed resolutions critical of Presidents and other public figures,<sup>72</sup> but none of these has been entitled formally, then or since, a censure resolution. On the one hand, the discovery of these resolutions may mean that they are non-judicial precedents even though we lack, at least as of yet, consensus for denominating them as such. On the other hand, the failure of these resolutions to characterize themselves as censures may be construed as additional precedents against censure. Whatever we may call them, they are, at least technically, not censure resolutions.

Third, establishing a precedent on censure is hard because of the significant gaps in the historical record. Even if we were to treat resolutions critical of Presidents and other public figures as censure resolutions, finding such resolutions is difficult. While the *Annals of Congress* (1789-1824) and its successor volume, the *Register of Debates* (1824-1837), provide abstracts of congressional debates, the editors included only the abstracts of debates that they considered "important."<sup>73</sup> The *Congressional Globe* (1833-1873) initially contained a condensed report, rather than a verbatim report of the debates and transcription, but Congress voted in 1873 to replace the *Globe* with the *Congressional Record*, an in-house publication that continues to

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Richardson ed., 1897); Andrew Jackson, U.S. President, Message to the Senate Clarifying the Protest (Apr. 21, 1834), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, *supra*, at 93-94.

70. WILENTZ, *supra* note 31, at 454.

71. See generally Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33 (1999) (discussing the constitutionality of the proposed censure of President Clinton and other arguably similar resolutions in the past).

72. See generally Jack Maskell, *Censure of the President by the Congress* (Cong. Res. Serv. 98-843A 1998) (reviewing House and Senate resolutions critical of presidents); Comm. on Fed. Legislation, Ass'n of the Bar of the City of New York, *Alternatives to Impeachment: What May Congress Do?*, Dec. 11, 1998, available at [http://www.nycbar.org/Publications/reports/show\\_html.php?rid=34](http://www.nycbar.org/Publications/reports/show_html.php?rid=34) (identifying as constitutionally significant resolutions passed by the House criticizing Presidents Tyler, Polk, Lincoln, Buchanan, and T. Roosevelt).

73. See Mildred L. Amer, *The Congressional Record: Content, History, and Issues*, 3 Cong. Res. Serv. 93-60, (1993).



provide the most comprehensive record of congressional activities.<sup>74</sup> A 1989 report to the National Archives describes the pre-1873 difficulties with congressional records:

The Constitution stipulates in Article I, section 5, that Congress simply maintain a journal of its proceedings. Production of an accurate record of the actual speeches and debates developed slowly. In part, this was due to congressional traditions. All Senate proceedings held from 1789 to 1795, for example, were closed to the public. Senate proceedings on its executive business (treaties and nominations) also were closed to the public until the 1920s. House deliberations, on the other hand, always have been open to the public, except on rare occasions. Because of the poor quality of early transcriptions, legislators insisted on the right to edit their remarks. Members of Congress also have been permitted to submit materials that they did not actually read on the floor for incorporation into the record.<sup>75</sup>

External events, such as the 1814 British invasion of Washington, D.C., destroyed earlier House records. Senate records from the same period also have not survived, but for different reasons.<sup>76</sup> Before 1946, it was unclear whether Senate rules required the records of special and select committees, as well as the records of subcommittees, to be returned to Congress at the end of the session.<sup>77</sup> Moreover, a combination of unsuitable storage conditions, loss of records, and other administrative issues finally led Congress to pass the Legislative Reorganization Act of 1946,<sup>78</sup> which required House and Senate committees to maintain, for the first time, a continuous record of all committee proceedings.<sup>79</sup> This Act also required that a legislator's committee staff and personal staff remain separate to reduce the possibility of mixing committee records with personal papers.<sup>80</sup> Before the Act, a legislative file might have included published items such as bills and resolutions. While the deficiencies of

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74. *See id.*

75. CHARLES F. SCHAMEL ET AL., U.S. NAT'L ARCHIVES & RECORDS ADMIN., GUIDE TO THE RECORDS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AT THE NATIONAL ARCHIVES, 1789-1989: BICENTENNIAL EDITION, H.R. DOC. NO. 100-245, at 15 (1989).

76. *Id.* at 3.

77. *Id.*

78. Pub. L. No. 79-601, 60 Stat. 812 (codified as amended in scattered sections of 2 U.S.C.).

79. SCHAMEL ET AL., *supra* note 75, at 3.

80. *See* 2 U.S.C. § 72(a) (2006) ("[P]rofessional staff members shall not engage in any work other than committee business and no other duties may be assigned to them . . ."); *id.* § 72(d) ("All committee hearings, records, data, charts, and files shall be kept separate and distinct from the congressional office records of the Member serving as chairman of the committee . . .").

congressional records prior to 1946 are not unique to censure,<sup>81</sup> they ought to sensitize us to the possibilities that actual citations or efforts to transform certain activities into precedents may never have been recorded or may have been left out of the official records.

## 2. Majority Rule in the Senate

From 2002 through 2005, many Republican senators maintained that majority rule in the Senate is a fixed constitutional principle. They claimed that Senate Rule XXII,<sup>82</sup> which requires a two-thirds vote to invoke cloture—to end filibusters—on motions to amend Senate rules, is unconstitutional because the rule bars a simple majority from exercising its constitutional entitlement to change Senate rules as it sees fit.<sup>83</sup> They argued that the rule unconstitutionally allows past Senate majorities to prevent current or future ones from changing Rule XXII as they prefer.<sup>84</sup> The Senate Majority Leader and other leading Republicans endorsed a plan—the “constitutional option,” sometimes referred to as the “nuclear option”—through which a simple majority in the Senate could engage in a series of procedural maneuvers to prevent filibusters on judicial nominees.<sup>85</sup> Although the plan was put on hold in the 109<sup>th</sup> Congress

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81. Before 1934, presidential and executive branch records had serious deficiencies. In the early 1900s, the State Department implemented, for the first time, a numbering system to record executive orders, beginning with President Lincoln's Emancipation Proclamation. From 1934 onward, the Federal Register has published presidential proclamations and executive orders. In 1935, Congress enacted the Federal Register Act, which requires, *inter alia*, the preservation of administrative rules and regulations. Federal Register Act, Pub. L. No. 74-220, 49 Stat. 500 (codified as amended in 44 U.S.C. §§ 1501-11 (2006)). In 1957, the Office of the Federal Register began publishing materials that presidents and other executive officials donated as historical materials to the National Archives, but it was not until the Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523-27 (codified as amended in 44 U.S.C. §§ 2201-07 (2006)) that Congress made presidents' papers the official property of the United States.

82. STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, R. XXII § 2, at 15-16 (2007).

83. See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 240 (1997) (explaining various textual arguments that support this view, for example, that “the Constitution's listing of seven instances where a two-thirds vote is required is seen as establishing that a simple majority is generally sufficient for action by a House of Congress”).

84. See, e.g., *id.* at 245-48 (arguing that “Rule XXII greatly limits the ability of future Senates to change current rules,” and that such a limitation is unconstitutional). *But cf.* John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Voting Requirements: A Defense*, 105 YALE L.J. 483, 496-500 (1995) (countering that the “three-fifths rule can be temporarily waived or permanently repealed at any time” by a simple majority of the current Senate).

85. See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AND HOW TO GET IT BACK ON TRACK* 162-69 (2006) (describing how the nuclear option works); Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. &

as a result of an agreement between seven Republican and seven Democratic senators,<sup>86</sup> a majority someday still could choose to deploy it to block a minority's filibuster of a judicial nominee.

There are, however, several impediments to claiming a precedent establishing majority rule in the Senate as a fixed constitutional principle. Even the two Senate staffers who coined the "constitutional option" as the name of their plan based it on a peculiar construction of the Senate rules rather than as a constitutional directive.<sup>87</sup> Similarly, in the Senate Rules Committee hearing on the "constitutional option", every witness, including all three Republican experts, conceded that the constitutional option was unprecedented.<sup>88</sup>

Furthermore, there are several easily discoverable precedents flatly rejecting majority rule as a fixed constitutional principle in the Senate. In 1925, Vice President Charles Dawes, on his first day in office, invited a majority of the Senate to bypass Senate rules to amend the rules as they saw fit, but more than eighty percent of the senators polled rejected his invitation.<sup>89</sup> In 1957, Vice President Richard Nixon declared that "he believed the Senate could adopt new rules 'under whatever procedures the majority of the Senate approves.'"<sup>90</sup> After Nixon urged the Senate to determine for itself Rule XXII's constitutionality, the Senate proceeded to ignore Nixon's statement and adhere to the requirements in Rule XXII for changing the rules. Though in 1961 Nixon reiterated his belief in majority rule in the Senate, the Senate again took no action to vindicate his point.

In 1967, Senator George McGovern proposed a resolution to require only a three-fifths vote of the Senate to invoke cloture. McGovern proposed ending debate on a motion to consider his

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PUB. POL'Y 205 (2004) (describing the "constitutional option" for a majority's successfully prohibiting judicial filibusters).

86. See MANN & ORNSTEIN, *supra* note 85, at 168 (explaining how the so-called "Gang of 14 pulled the Senate back from the brink" by brokering an informal agreement "to oppose both the nuclear option and filibusters on judicial confirmations").

87. *Cf. id.* at 166 (noting that Senate rules guru Martin Gold framed the case for the constitutional option by arguing for its consistency with Senate precedents).

88. See *Hearing on Rule XXII and Proposals to Amend the Rule Before the S. Comm. on Rules and Administration*, 108th Cong. (2003), available at [http://rules.senate.gov/hearings/2003/060503\\_hearing.htm](http://rules.senate.gov/hearings/2003/060503_hearing.htm).

89. See Joseph R. Biden, Jr., *Floor Statement: Jumping Off the Precipice: The "Nuclear Option" and the United States Senate*, Apr. 27, 2005, available at <http://biden.senate.gov/newsroom/details.cfm?id=237030> (discussing the significance of the senators' rejection of Dawes' suggestion).

90. For the pertinent text discussing Rule XXII, see STAFF OF S. COMM. ON RULES & ADMIN., 99TH CONG., *SENATE CLOTURE RULE: LIMITATION OF DEBATE IN THE CONGRESS OF THE UNITED STATES AND LEGISLATIVE HISTORY OF PARAGRAPH 2 OF RULE XXII OF THE STANDING RULES OF THE UNITED STATES SENATE (CLOTURE RULE)* 24-28 (Comm. Print 1985).

proposed resolution and suggested—contrary to the rules—that only a majority was needed. Some senators construed his request as asking that proposals to amend Rule XXII be subject to a majority vote to invoke cloture. Vice President Hubert Humphrey refused to comment on McGovern's request. Instead, he relied on precedent allowing the Senate, rather than the Vice President, to decide constitutional questions. The Senate then voted 61-37 to reject McGovern's proposal for ending debate and voted 59-37 to sustain a point of order raised by Senator Everett Dirksen, who had challenged the constitutionality of McGovern's motion that only a majority was needed to end Senate debate. These votes may be construed as determinations that McGovern's proposal was unconstitutional.

The Senate again debated the constitutionality of Rule XXII in 1969. In the course of the debate, Senator Frank Church asked the Chair, Vice President Humphrey, whether a majority had the power to invoke cloture, contrary to the rules of the Senate. Humphrey answered in the affirmative and then explained that

if a majority of the Senators present and voting but fewer than two-thirds vote [as required by the rule] in favor of the pending motion for cloture, the Chair will announce that a majority having agreed to limit the debate [on the resolution under consideration,] to amend XXII, at the opening of a new Congress, debate will proceed under the cloture provisions of that rule.<sup>91</sup>

Humphrey acknowledged this ruling was subject to appeal to the full body without debate.<sup>92</sup> The Senate initially voted 51-47 to invoke cloture, after which Humphrey invoked it.<sup>93</sup> But the Senate immediately voted to reverse Humphrey's ruling by a 53-45 roll call vote, thereby requiring the Senate to revert to its two-thirds rule.<sup>94</sup>

In 1975, the incident arose which at least some proponents of the "constitutional option" cite as the most pertinent authority. Senator Walter Mondale proposed to amend Rule XXII to require only a three-fifths vote to invoke cloture.<sup>95</sup> During the debate over the motion, he asked whether a majority of the Senate may "change the rules of the Senate, uninhibited by the past rules of the Senate?"<sup>96</sup> Vice President Nelson Rockefeller refused to answer the question, submitting it instead to the full Senate's consideration.<sup>97</sup> Subsequently, Senator James Pearson made a motion to consider

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91. 91 CONG. REC. 593 (1969) (statement of Vice President Humphrey).

92. STAFF OF S. COMM. ON RULES & ADMIN., *supra* note 90, at 29.

93. Gold & Gupta, *supra* note 85, at 251 (citing 91 CONG. REC. at 994).

94. *Id.* at 252 (citing 91 CONG. REC. at 995).

95. STAFF OF S. COMM. ON RULES & ADMIN., *supra* note 90, at 30.

96. 121 CONG. REC. 758 (1975).

97. STAFF OF S. COMM. ON RULES & ADMIN., *supra* note 90, at 31.

Mondale's proposal and suggested that a majority vote was sufficient to invoke cloture.<sup>98</sup> Senator Mike Mansfield claimed that Pierson's motion was out of order, but the Senate rejected Mansfield's point of order 51-42, arguably signaling to some senators approval of Mondale's claim that a majority vote was sufficient to invoke cloture.<sup>99</sup> This latter vote is treated by proponents of the "constitutional option" as supportive precedent, even though two weeks later the Senate voted 53-38 to reconsider what it had done and voted 53-43 to sustain Mansfield's point of order that a majority lacked the authority to bypass the rules to amend Rule XXII.<sup>100</sup> Through the latter two votes, the Senate "erased the [only] precedent of majority cloture established two weeks before, and reaffirmed the [Senate] rules."<sup>101</sup> Subsequently, the Senate agreed to a compromise proposed by Senator Robert Byrd, voting 73-21 on March 7, 1975, to end debate on Mondale's proposal to amend Rule XXII, and formally amended Rule XXII by a vote of 56-27 (pursuant to Rule XXII, which allows a simple majority to amend the rules after a vote to invoke cloture) to require a three-fifths vote to invoke cloture.<sup>102</sup>

Historical practices further undermine the claim of majority rule as a fixed constitutional principle. The Senate's longstanding traditions and rules include several counter-majoritarian measures, including unanimous consent requirements, holds, and filibusters. Nevertheless, in 2005, Senate Majority Leader Bill Frist suggested that there had been a Senate tradition of having up-or-down votes on judicial nominations.<sup>103</sup> The assertion is counter-factual: As Thomas Mann and Norman Ornstein observe, "For more than two hundred years, hundreds of judicial nominees at all levels had their nominations buried, killed, or asphyxiated by the Senate, either by one individual, a committee, or small group of senators, before the nominations got anywhere near the floor."<sup>104</sup> Senator Frist could argue that judicial filibusters were unprecedented only by both ignoring the

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98. *Id.* at 30.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 31-32.

103. See Bill Frist, *It's Time for an Up-or-Down Vote*, USA TODAY, May 16, 2005, at 12A ("[T]he Senate has always followed a careful and deliberate process of examining the nominees through hearings, discussing their merits in committee, debating them in the full Senate and then coming to an up-or-down vote on the Senate floor.").

104. MANN & ORNSTEIN, *supra* note 85, at 167-68 (referring to holds, the blue-slip process, the discretion of committee chairs not to schedule committee votes, and negative committee votes as the various means through which differently sized minorities nullify judicial nominations and other legislative business in the Senate).

relevance of the numerous judicial nominations defeated by means other than formal floor votes in the Senate and trying to revise the meaning or significance of the easily discoverable filibuster that forced the withdrawal of President Lyndon Johnson's nomination of Abe Fortas as Chief Justice.<sup>105</sup>

The final problem with establishing a precedent for majority rule as a fixed constitutional principle is that it is easy to distinguish the four precedents that are most commonly cited in its support. These precedents involve Senator Robert Byrd's successful efforts to secure majority votes to (1) end post-cloture filibustering, (2) limit amendments to appropriation bills, (3) require nominations rather than treaties as the first piece of business in executive sessions, and (4) alter voting sequences on some measures.<sup>106</sup> While some proponents of the "constitutional option" cite these as precedents of majorities amending rules,<sup>107</sup> neither the Parliamentarian nor the Congressional Research Service, nor anyone other than the losing minority in Senate debates over the constitutionality of Rule XXII, construe them as such. The failure of a Senate majority ever to cite (or even to rely on) them in support of a fixed constitutional principle of majority rule in the Senate undermines their authority. Instead, these precedents signify the enforcement, rather than the formal amendment, of Senate rules.

### 3. Presidential Reliance on Treaty Authorizations to Use Military Force

Whereas establishing majority rule in the Senate as a precedent depends on assigning dubious meaning to otherwise discoverable precedents, there is no discoverable precedent supporting treaty authorizations for Presidents to wage war. In this case, the problem is determining the significance of a non-event—the Senate's failure to ratify treaties with such authorizations.

The fact that the Senate never has ratified a treaty authorizing a President to use force could be construed as a precedent against the constitutionality of any such authorization. Indeed, one easily

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105. See *id.* at 251 n.14 ("Proponents of the nuclear option argued that Fortas had not been filibustered, even though virtually every news account at the time and the comments of Fortas opponents viewed the actions against him as a filibuster. Moreover, the official Senate Web site, in its section on history, has as its headline 'October 1, 1968: Filibuster Derails Supreme Court Appointee.'").

106. See generally Gold & Gupta, *supra* note 85, at 262-69 (describing the "Byrd" precedents).

107. *Id.*

discoverable precedent apparently makes this point. The Senate rejected membership in the League of Nations in part because of senators' fears that it would have allowed this country to go to war without congressional authorization and would have subjected U.S. forces to the control of foreign leaders.<sup>108</sup> But treaties to which the United States is a party usually contain no such authorizations. For instance, the North American Treaty's provision states only that an armed attack on any member "shall be considered an attack against them all," and "each party will assist the Party or Parties so attacked by taking forthwith . . . such action as it deems necessary."<sup>109</sup> Moreover, there appear to be structural limitations on the treaty power, such as the Federal Constitution's Origination Clause requirement that the House alone has the power to initiate appropriations.<sup>110</sup>

The Senate's persistent failure to endorse certain outcomes is not necessarily a discoverable precedent. Whereas consistent, longstanding construction of Blount's impeachment clearly rules out impeaching members of Congress, national political leaders and some scholars have *not* ruled out the constitutionality of a treaty authorization of a President's use of military force.<sup>111</sup> First, some may argue that, while there may not be any precedents authorizing such treaties, there are no precedents disallowing them. Second, because there are no subject matter limitations on the treaty power, it may be used to expand the powers that the Congress or the President enjoy.<sup>112</sup>

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108. See generally SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 880-82 (1965) (explaining that many senators probably would have voted for U.S. membership in the League of Nations had there been reservations added to it declaring that American armed forces would not be obligated to intervene "to preserve every new boundary set up under the Treaty of Versailles").

109. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. But the United Nations Security Council has the power under the United Nations Charter (to which the United States is a party via a statute) to move UN members into a state of hostilities with malefactor nations. Although President George H.W. Bush cited the UN Security Council's authorization as the basis for his mobilization of American troops in response to Iraq's invasion of Kuwait, he agreed in the eleventh hour to seek—and he received—congressional approval for the use of force in what ensued as Desert Storm.

110. U.S. CONST. art. I, § 7.

111. See, e.g., Philip C. Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1393-94 (1994) (pointing out that "[a]nother route to war is by treaty, because treaties have, by virtue of Article VI, the same legal force as statutes").

112. Cf. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1869 (2005) (arguing against the declaration that "there are no subject-matter limitations on the treaty power" in the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, in part because it allows treaties to expand congressional powers beyond those explicitly recognized in the Constitution).

Third, some people may argue that the federal government can use its treaty power to do at least as much as, if not more than, it is allowed to do through ordinary lawmaking. After all, the Supremacy Clause<sup>113</sup> seems to suggest that treaties generally are (but only laws in accordance with the Constitution are) “the supreme law of the land” and thus that the federal government has even more extensive authority under the treaty power than it does through ordinary lawmaking. If Congress may authorize presidential use of force through ordinary statutes, then it may do at least as much through its treaty power. But, the question of the constitutionality of such treaties is not answered by the Supremacy Clause.<sup>114</sup> To be sure, courts are unlikely to review this question.<sup>115</sup> Once the Senate ratifies a treaty, the matter of its constitutionality effectively is left to the President and Senate acting concurrently, which provides the strongest constitutional foundation for Presidents to authorize military force (according to Justice Robert Jackson’s popular framework for separation-of-powers analysis).<sup>116</sup> And while there may be easier ways than treaties (which require at least two-thirds of the Senate for ratification) for Presidents to secure authorization to go to war,<sup>117</sup> Presidents have no incentive to rule out treaties as viable options in the future.

Yet, all discoverable events on point support rejecting treaty authorizations of presidential use of force. Without any precedent directly supporting the constitutionality of such authorizations, much less any subsequent reliance on, or citation to, such a precedent, there is no network of supportive citation. The absence of a precedent on point is not incontrovertible proof of the unconstitutionality of treaty authorizations of military force, and it is still possible to find support for them in other sources of constitutional argumentation, such as text or original meaning. However, precedent provides no authority for allowing treaties to sanction presidential use of force through treaties.

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113. U.S. CONST. art. VI.

114. *See, e.g.,* Bobbitt, *supra* note 58, at 1394.

115. *See, e.g.,* *Goldwater v. Carter*, 444 U.S. 996 (1979) (four justices maintaining that presidential rescission of treaties is a non-justiciable, political question, with Justice Powell arguing that the claim was not yet ripe for judicial review because Congress had taken no action to assert its constitutional authority).

116. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

117. U.S. CONST. art. II, § 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur . . .”).



## II. THE NOTABLE FEATURES OF NON-JUDICIAL PRECEDENTS

In this Part, I develop an extensive taxonomy for non-judicial precedents. I classify them by features distinguishing them from each other and from judicial precedents.

### *A. The Extensiveness of Non-Judicial Precedents*

The first distinctive feature of non-judicial precedents is their extensive variety. They may be categorized on the basis of the actors producing them, their substantive content, or the powers deployed to create them.

#### 1. The Extensive Variety of Non-Judicial Actors

One way to measure the range of non-judicial precedents is by the range of actors making them. As Philip Bobbitt observes, "there are as many kinds of precedent as there are constitutional institutions creating them."<sup>118</sup> Some of these institutions, including Congress and Presidents, are familiar, while others, like cabinet officials or the heads of federal agencies, may be less so. Moreover, there are state and local officials, including governors, state legislatures, and mayors, who have the power to make precedents.

The American public has the power to make precedents through their interactions with public leaders. Constitution-making is one example. While the Framers drafted the Constitution behind closed doors,<sup>119</sup> the ratification process was a public event with many formal and informal participants.<sup>120</sup> The processes by which our Constitution and state constitutions have been made and amended may serve as precedents in the course of the public's efforts to fashion new constitutional protections at the federal or state levels or abroad. Popular elections are important means through which political leaders interact with the public to ratify constitutional agendas, as Franklin

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118. Bobbitt, *supra* note 111, at 1383.

119. See CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, at 22-23 (1966) (explaining that some delegates criticized the secrecy of the Constitutional Convention, but also noting that, at the time, "[s]ecrecy in legislative assemblies" was the norm).

120. See MICHAEL A. GILLESPIE & MICHAEL LIENESCH, *RATIFYING THE CONSTITUTION* 1 (Michael A. Gillespie & Michael Lienesch eds., 1989) (explaining that the ratification process involved "more than seventeen hundred delegates, chosen in town meetings and local elections by tens of thousands of voters throughout the land," and that noting that the deliberations of these delegates took place not behind closed doors, but "in churches and taverns, in letters to the editor and newspaper columns, in whispered conversations and noisy stump speeches," as well).

Roosevelt, Ronald Reagan, and Richard Nixon each did in seeking public approval of their pledges to transform the courts.<sup>121</sup> How these Presidents achieved their agendas—Roosevelt to make the Court more supportive of the constitutionality of the New Deal, Nixon to appoint “strict constructionists,” and Reagan to curtail liberal judicial activism—creates potential precedents for future Presidents to emulate. Moreover, legal scholars, civil rights and other organized interest groups, and the American Bar Association may create precedents of their own. For instance, the American Bar Association evaluates judicial nominees and proposed legislation<sup>122</sup> and the Lawyers’ Committee for Civil Rights Under Law in comments on nominations, sponsors and coordinates litigation, and lobbies for civil rights legislation.<sup>123</sup>

## 2. The Different Kinds of Constitutional Judgments

Non-judicial precedents may be categorized on the basis of their substantive content. First, there are non-judicial precedents with purely constitutional content. These precedents are decisions in which non-judicial authorities directly address constitutional questions. For example, non-judicial precedent apparently guided the National Archivist in resolving the legality of the Twenty-seventh Amendment.<sup>124</sup> The Amendment was first proposed in 1791, but an insufficient number of states voted to ratify it by the end of the First Congress.<sup>125</sup> Without any time limit or deadline for ratification imposed by Congress, it was unclear whether states joining the union after the Amendment was proposed were precluded from voting on its ratification.<sup>126</sup> By 1992, thirty-eight states had ratified the

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121. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 130-31 (rev. ed. 2003).

122. See generally *THE ABA IN LAW AND SOCIAL POLICY: WHAT ROLE?* (1994) (exploring the role the ABA has played with regard to legislation on various national issues and also with regard to judicial nominations).

123. See, e.g., Press Release, Lawyers’ Committee for Civil Rights Under Law, Lawyers Committee for Civil Rights Under Law Urges Rejection of John D. Ashcroft as Attorney General of the United States (Jan. 22, 2001), available at <http://lawyerscommittee.org/2005website/publications/press/press011801.html>.

124. U.S. CONST. amend. XXVII. See Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 532-33 (1992) (explaining that the test that National Archivist Don W. Wilson used to determine whether to certify the Amendment was “whether the state certificates of ratification meet the requirements of Article V and whether the certificates set forth congruent texts of the amendment”).

125. See Bernstein, *supra* note 124, at 532-33.

126. See *id.* at 537-38, 542-51.

amendment.<sup>127</sup> Following precedent, the National Archivist deferred to states' decisions and certified the Amendment's adoption,<sup>128</sup> and Congress declared the Amendment valid by joint resolution.<sup>129</sup>

Second, non-judicial precedents may consist of mixtures of constitutional and policy judgments. One example is the Senate's rejection of President Roosevelt's Court-packing plan. The Senate Judiciary Committee declared the plan "unconstitutional" and concluded that "[i]ts practical operation would be to make the Constitution what the executive or legislative branches of the government choose to say it is—an interpretation to be changed with each change of the administration."<sup>130</sup>

Third, non-judicial precedents may consist primarily of policy. Indeed, most non-judicial activities have this kind of content. For instance, congressional voting on legislation obviously entails making policy choices, though it might often involve implicit judgments made by some members about the constitutionality of the legislation on which they are voting.

### 3. Categorizing on the Basis of Form or Context

Non-judicial precedents may be categorized according to their forms or the contexts in which they are made. For example, non-judicial precedents may consist of floor votes and rulemaking in the House or Senate.<sup>131</sup> While not all of these activities may be based expressly on constitutional judgments, the formulations, retentions, and attempted amendments of House or Senate rules depend on the members' understandings of their constitutional power to undertake these activities.

But members of Congress do not just create precedent through formal lawmaking or rulemaking. Their inaction also may produce precedents. Members of Congress may create precedents when they vote against legislation they deem unconstitutional or when they vote not to impeach or convict someone because they do not believe his

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127. See U.S. Constitution Amendment 27, 57 Fed. Reg. 21,187 (May 19, 1992).

128. See *With Little Fanfare, Amendment Is Signed*, N.Y. TIMES, May 19, 1992, at A14.

129. See Bernstein, *supra* note 124, at 542 (noting that Congress overwhelmingly confirmed the Archivist's decision by a 99-0 vote in the Senate and a 414-3 vote in the House).

130. See S. REP. NO. 75-711, at 13-14 (1937) (summarizing senators' explanations for their rejection of the Court-packing plan), reprinted in LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 94-96 (1992).

131. See, e.g., Betsy Palmer, *Changing Senate Rules: The "Constitutional" or "Nuclear" Option 1* (Cong. Res. Serv., CRS Report for Congress Order Code RL32684, Apr. 5, 2005) (describing the presiding officer's and institution's formal judgments on rules and their operation as governing "precedents" within the Senate).

misconduct to be impeachable. Their refusals to declare war also may create potential precedents about the legal prerequisites for such declarations. Similarly, they may be creating precedents when they vote against judicial nominations based on their disapproval of the nominees' constitutional opinions.

In fact, most congressional activity occurs off of the House and Senate floors. Legislative committees may create precedent through what they approve or disapprove. Committees are Congress's gatekeepers, as nothing reaches the floor of the House or Senate without first being considered in committee.<sup>132</sup> Usually, a committee's disapproval is fatal, though exceptions are made through discharge petitions (requiring majority approval in the House and unanimous consent in the Senate).<sup>133</sup>

Congressional constitutional judgments also may take the forms of informal practices, norms, and traditions.<sup>134</sup> Seniority has been a longstanding, but not binding, criterion for committee assignments in the House and Senate.<sup>135</sup> The practice constitutes a continuing exercise of each chamber's authority to "determine Rules for its proceedings."<sup>136</sup> Each chamber's formal rules derive from the same explicit constitutional authority.

Presidents and other executive officials may produce precedent in at least as many forms as Congress does. They may create precedents through executive orders, federal regulations, and the official opinions and memoranda of legal counsel in every executive department and agency. Presidents and executive officials also render constitutional judgments through informal practices, norms, and traditions. For instance, Presidents from Thomas Jefferson through Woodrow Wilson delivered their States of the Union by letter, but Wilson inaugurated what has become the customary presidential

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132. See Arthur T. Denzau & Robert J. Mackay, *Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior*, 27 AM. J. POL. SCI. 740, 741-44 (1983) (examining the ways in which committee members can sometimes exploit their 'gatekeeping' role).

133. See generally Congressional Quarterly, *Guide to Congress* 425 (3d ed. 1982). Discharge petitions allow a majority of House members to bring to the floor bills that have been before a committee for a certain period of time (thirty days, in the case of standing committees, and seven days, in the case of the Rules Committee) without being acted on by that committee.

134. See, e.g., *id.* at 195-96 (discussing the "norm" of senatorial courtesy and other longstanding practices of the Senate).

135. See Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623, 662-63 (1996) (charting the peaks and valleys of the seniority system over the course of the twentieth century).

136. U.S. CONST. art. I, § 5.

practice of delivering the address before a joint session of Congress.<sup>137</sup> The practice has enhanced the prestige of the President by giving him a much more visible and powerful bully pulpit from which to speak—national coverage of his special addresses to joint sessions of Congress. The choice of delivering the State of the Union is the consequence of Presidents' judgments about how they would like to deliver their address *and* Congress's acquiescence.

State officials render constitutional judgments in at least as many forms as federal officials do. State constitutions are the states' most prominent constitutional judgments; they provide additional governmental obligations and powers beyond those that the federal Constitution requires. State law, for instance, generally sets forth the legal definitions of life, marriage, and death.<sup>138</sup> Moreover, since Massachusetts legally wed the first same-sex couple in 2004, eighteen states have amended their state constitutions to prohibit gay marriage.<sup>139</sup> These eighteen state constitutional amendments all are based in part on lawmakers' conceptions of their constitutional authorities over the subject. In addition, state law defines the authority of State Attorneys General to issue legal opinions.<sup>140</sup> Because Governors usually do not appoint State Attorneys General, these officials may disagree over constitutional issues, and thus some states have developed special processes for resolving such disagreements.<sup>141</sup> Moreover, state legislatures create precedents similar to those made by Congress. All state legislators make judgments about legislation, and state constitutions set forth procedures for removing or recalling certain officials.<sup>142</sup> For instance,

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137. See H.W. BRANDS, WOODROW WILSON 29-31 (2003) (describing this innovation as "one of [Wilson's] lasting contributions to American governance").

138. See, e.g., CAL. HEALTH & SAFETY CODE § 7180 (Deering 2007) (defining "death" as either "irreversible cessation of circulatory and respiratory functions," or "irreversible cessation of all functions of the entire brain").

139. Anna Badkhen, *In Massachusetts, Gay Weddings are Now Routine; Growing Acceptance of Same-Sex Nuptials on First Anniversary*, S.F. CHRON., May 17, 2005, at A4.

140. See NAT'L ASS'N OF ATTORNEYS GEN., STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 61-75 (Lynne M. Ross ed., 1990) (discussing nature and effect of advisory opinions of attorneys general).

141. For instance, former Virginia governor Doug Wilder appointed special legal counsel to represent the Virginia Retirement System because he perceived that Mary Sue Terry, the attorney general, would have a conflict of interests. Though Terry filed suit, the state assembly resolved the impasse under section 2.1-122(a) of the Virginia Code (current version at VA. CODE ANN. § 2.2-510.1 (2007)), which specified that the governor may appoint special counsel when the Attorney General's office is "unable" to render the service at issue.

142. See, e.g., CAL. CONST. art. VII, § 8 (regarding disqualification from office, bribery, and improper election practices); MO. CONST. art. VII, §§ 1, 4 (regarding impeachment and removal of officers not subject to impeachment); N.C. CONST. art. VI, § 8 (regarding disqualifications for office).

in 2003 the voters of California agreed to recall (and thus remove) then-Governor Gray Davis and to replace him with Arnold Schwarzenegger.<sup>143</sup> In 2004, Connecticut Governor John Rowland resigned when confronted with the likely prospect of his impeachment and removal from office for misappropriating funds,<sup>144</sup> while New Jersey Governor James McGreevey resigned in anticipation of an effort to remove him based on allegations that he had sexually harassed a male employee.<sup>145</sup>

State law also serves as the primary basis for certain interests protected by the Federal Constitution. In cases requiring interpretation and application of the Contracts Clause,<sup>146</sup> courts need to determine whether a contract exists before deciding whether a particular contractual obligation has been impaired. Whether a contract exists depends on the relevant state law.<sup>147</sup> In cases involving construction of the Due Process Clause<sup>148</sup> or the Takings Clause,<sup>149</sup> the Court consults state law to determine whether an interest qualifies as “property.”<sup>150</sup> Moreover, the Court at times has undertaken determination as to whether a particular criminal sentence is

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143. Charlie LeDuff, *The California Recall: The Governor-Elect; A Sudden, Decisive Victory for a Newcomer to Politics*, N.Y. TIMES, Oct. 8, 2003, at A26.

144. William Yardley, *Under Pressure, Rowland Resigns Governor's Post*, N.Y. TIMES, June 22, 2004, at A1.

145. Laura Mansnerus, *McGreevey Steps Down After Disclosing a Gay Affair*, N.Y. TIMES, Aug. 13, 2004, at A1.

146. U.S. CONST. art. I, § 10 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

147. See, e.g., *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) (addressing the issue of whether a particular Indiana law amounted to a contract between the State and an individual acting on the basis of that law); *Ogden v. Saunders*, 25 U.S. 213, 259 (1827) (“It is, then, the municipal law of the State, whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, wherever its performance is sought to be enforced.”).

148. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

149. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

150. See, e.g., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (noting that state law creates the underlying substantive interest whose deprivation may violate the Due Process Clause if the interest rises to the level of a “legitimate claim of entitlement”); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (finding property interests to be “created and . . . defined by existing rules or understandings that stem from an independent source such as state law”); *Fox River Paper v. R.R. Comm’n*, 274 U.S. 651, 653-54 (1927) (refusing to dismiss case for lack of jurisdiction merely because the existence of the riparian right for which plaintiffs in error sought constitutional protection depended upon state law); *Sauer v. City of New York*, 206 U.S. 536, 548 (1907) (declining to find a Takings Clause violation where New York law did not support plaintiff’s holding an easement that could have been deprived of him in the first place).

"unusual" in violation of the Eighth Amendment<sup>151</sup> by measuring its consistency with state punishment schemes.<sup>152</sup> In substantive due process cases, the Court often has deferred to state practices as establishing a benchmark in the form of tradition against which to measure the legality of a particular action. In *Lawrence v. Texas*, the majority found "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>153</sup> The Court found no tradition or "longstanding history in this country of laws directed at homosexual conduct as a distinct matter"<sup>154</sup> and thus overruled *Bowers v. Hardwick*, which mistakenly had identified a tradition supporting the criminalization of homosexual activity.<sup>155</sup>

The public's expression of constitutional judgments also may have the potential to become precedent. Direct democracy implements popular sovereignty, and popular sovereignty is a major theme and influence in our constitutional development.<sup>156</sup>

In addition, the efforts of non-judicial authorities to fortify judicial precedents constitute another set of non-judicial precedents. While judicial decisions helped the civil rights movement flourish, they did so with the aid of significant presidential and congressional activities,<sup>157</sup> such as President Truman's executive order desegregating the military and the passage of the 1958 and 1964 Civil Rights Acts.<sup>158</sup> Furthermore, the civil rights movement, particularly the cohesive litigation strategy to end state-mandated segregation, is the model for contemporary interest groups to advance their agendas

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151. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

152. See, e.g., *Ewing v. California*, 538 U.S. 11, 24-25 (2003) (undertaking interjurisdictional analysis with respect to "three strikes" laws). But see *Lockyer v. Andrade*, 538 U.S. 63 (2003) (undertaking no such comparative analysis).

153. 539 U.S. 558, 572 (2003).

154. *Id.* at 568.

155. 478 U.S. 186 (1986); see *Lawrence*, 539 U.S. at 570-71.

156. See generally LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing that the American people bear ultimate responsibility for the interpretation and implementation of the American Constitution).

157. See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (concluding that intervention by the federal government facilitated a fundamental shift in the racial attitudes and practices of U.S. society).

158. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957).

through litigation over such diverse issues as gay marriage, abortion rights, and church-state relations.<sup>159</sup>

#### 4. Congressional and Presidential Authorities

Non-judicial precedents may be categorized on the basis of the powers producing them. For instance, the Constitution explicitly vests Congress with seventy-five powers, Presidents with fourteen, and Vice Presidents with five. The exercise of each of these powers has the potential to become a precedent. For instance, pursuant to express authority set forth in Article I, the House of Representatives has excluded five people from being seated because of their failures to satisfy the requirements for membership in the House,<sup>160</sup> expelled four members,<sup>161</sup> censured twenty-two members for misconduct,<sup>162</sup> and reprimanded eight members for misconduct.<sup>163</sup> The Senate has excluded six people from being seated,<sup>164</sup> expelled fifteen members,<sup>165</sup> and censured nine members.<sup>166</sup> Although these legislative acts are ignored in the study of precedent, they serve as precedents on the problem of how to handle the misconduct of members of the House and Senate.

Presidents also may create precedents through the exercise of their official powers. For instance, President Andrew Jackson's veto of the Second National Bank is one of the most famous statements and precedents bolstering the proposition that the "opinion of the judges has no more authority over Congress than the opinion of Congress has

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159. See MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 144 (1987) (describing a common perception of the NAACP's litigation campaign as a model for public interest law generally).

160. See ROBERT L. TIENKEN, *PRECEDENTS OF THE HOUSE OF REPRESENTATIVES RELATING TO EXCLUSION, EXPULSION AND CENSURE* (Washington, D.C. Library of Congress, Congressional Research Service, 1973). *But see* *Powell v. McCormack*, 395 U.S. 486, 489-92 (1969) (overturning exclusion of U.S. Representative Adam Clayton Powell, Jr. from the 90th Congress on grounds that he wrongfully diverted House funds for personal use and for the use of others and made false reports regarding expenditures of foreign currency).

161. See JACK MASKELL, *EXPULSION, CENSURE, REPRIMAND, AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES 24-25* (Cong. Research Serv., CRS Report for Congress Order RL 31382, 2002). After pleading guilty to several felonies, and before the House formally expelled him, Bob Ney resigned from the House on November 3, 2006. See Jack Torry & James Nash, *Ney Quits, "Seven Weeks Too Late"; Convicted Congressman Infuriates Ohio Republicans*, COLUMBUS DISPATCH, Nov. 4, 2006, at A1.

162. Maskell, *supra* note 161, at 22-23.

163. *Id.* at 23-24.

164. ANNE M. BUTLER & WENDY WOLFF, *UNITED STATES SENATE ELECTION, EXPULSION, AND CENSURE CASES, 1793-1990*, S. DOC. NO. 103-33, at xviii (1st Sess. 1995).

165. *Id.* at xxviii.

166. *Id.* at xxix.



over the judges, and on that point the President is independent of both.”<sup>167</sup> Moreover, as of October 9, 2006, Presidents have vetoed more than 2500 federal laws—far more than the 165 struck down by the Court.<sup>168</sup> These vetoes may comprise an important set of precedents on executive power.

Many other executive powers are similarly discounted, yet they remain significant. For instance, Presidents choose how to structure their office.<sup>169</sup> President Richard Nixon had only one White House counsel—John Dean—while President George W. Bush has almost twenty people in the White House Counsel’s office.<sup>170</sup> Other executive officials create precedents through the exercise of their respective authorities. For instance, the President may ask the Attorney General for formal advice on particular constitutional questions.<sup>171</sup> This advice is given in the form of official opinions from the Office of Legal Counsel in the Justice Department.<sup>172</sup>

Similarly, we mistakenly discount the Vice President’s authority. On his last day in office as Vice President, Al Gore, Jr. undertook to settle the 2000 presidential election, as “President of the Senate,”<sup>173</sup> by overseeing the final count of electoral votes for the presidency, including opening “all the certificates” of electoral votes cast.<sup>174</sup> Gore did not have to settle any challenges to electoral votes, but a much earlier Vice President, Thomas Jefferson, effectively exercised this non-reviewable power to his advantage after the closely contested presidential election of 1800.<sup>175</sup>

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167. Andrew Jackson, Veto Message, July 10, 1832, *reprinted in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1145 (James D. Richardson ed., 1897).

168. Sanford Levinson, *Poison Pen*, NEW REPUBLIC, Oct. 9, 2006, at 12.

169. See, e.g., 1 GUIDE TO THE PRESIDENCY 816 (Michael Nelson ed., CQ Press 3d ed. 2002) (1989) (describing the efforts of President Franklin D. Roosevelt, in conjunction with Congress’s passage of a reorganization act, to modernize the administration of the White House).

170. See Michael A. Fletcher, *Quiet but Ambitious White House Counsel Makes Life of Law*, WASH. POST, June 21, 2005, at A19 (mentioning White House Counsel Harriet Miers’ staff of thirteen lawyers); see also Dan Froomkin, *2004 White House Office Staff List*, WASH. POST, <http://www.washingtonpost.com/wp-srv/politics/administration/whbriefing/2004stafflistc.html> (2004) (providing a list of paid White House staff).

171. See 2 GUIDE TO THE PRESIDENCY 1221-23 (Michael Nelson ed., CQ Press 3d ed. 2002) (1989) (describing the changing priorities of the Attorney General and the Department of Justice through the Nixon, Ford, Carter, Reagan, George H.W. Bush, and Clinton administrations).

172. See generally Douglas W. Kmiec, *OLC’s Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 337-38 (1993) (citing several “famous executive decisions” guided by advice provided by the Office of Legal Counsel).

173. U.S. CONST. art. I, § 3

174. U.S. CONST. amend. XII.

175. See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 55-69 (2005) (noting that this constitutional provision permitted Thomas Jefferson, sitting as both Vice President of the United

Another overlooked, but not insignificant, power is the explicit authority within the House to “chuse their Speaker and other Officers”<sup>176</sup> and the Senate to “chuse their other Officers.”<sup>177</sup> Pursuant to these authorizations, the chambers have chosen their leadership for more than two hundred years. Many other implicit powers are rarely reviewed, but when the Court has done so, it has not questioned their exercise. For instance, the principal dispute among the Justices in *Goldwater v. Carter* was not whether, but why they should avoid adjudicating whether Presidents have the authority to rescind treaties unilaterally.<sup>178</sup>

The range of these various actors’ powers says nothing about their finality. The next Part examines the durability and finality of the overwhelming number of non-judicial authorities’ constitutional judgments, even when they are subject to judicial review.

### *B. The Finality of Non-Judicial Precedents*

Judicial review of non-judicial constitutional activities is more limited than commonly thought. In this Section, I examine how non-judicial precedents may be distinguished based on the extent to which they are the last words on constitutional matters.

#### 1. The Limited Scope of Judicial Review

Anyone familiar with constitutional law knows that the Court does not have the power to decide every constitutional issue it wants to decide.<sup>179</sup> By design, the Court must wait for constitutional questions to come before it. Indeed, the Court never has had

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States and President of the Senate, to count Georgia’s four electoral votes for the Republicans in the 1800 election rather than disqualify them, despite widely publicized irregularities with Georgia’s submitted ballot and despite Jefferson’s own candidacy for the U.S. Presidency at the time).

176. U.S. CONST. art. I, § 2, cl. 5.

177. U.S. CONST. art. I, § 3, cl. 5.

178. 444 U.S. 996 (1979). The Court vacated the claim. *Id.* Four Justices based their decision on the political question doctrine, *id.* at 1002 (Rehnquist, J., concurring), while Justice Powell concurred on the grounds that the claim was not yet ripe for judicial review because Congress had taken no action to assert its constitutional authority, *id.* at 996-98 (Powell, J., concurring). See PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW 807 (2d ed. 2005) (“[T]he Executive has adhered to a constitutional view . . . that the President has unreviewable authority (a) to determine when the interests of the United States demand U.S. military action and (b) to commit our troops to the protection of U.S. interests, even without clear legislative authority.”).

179. See ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 18 (1976) (noting the limitation that the courts may only decide constitutional issues as questions of law “in the course of ordinary litigation”).

jurisdiction to hear all possible constitutional claims.<sup>180</sup> Nor are all constitutional questions litigated, and of the constitutional questions that are litigated, not all are appealed to the Supreme Court.<sup>181</sup> Of those that are appealed, the Court chooses not to hear all of them. Of the questions that the Court chooses to decide, not all are constitutional cases,<sup>182</sup> and most constitutional cases involve the constitutional judgments of non-judicial authorities. Hence, virtually every question of constitutional law that the Court hears already has been considered by one or more non-judicial actors. It is thus an exaggeration to assume that judicial review makes the Court supreme in fashioning constitutional law.

In fact, most constitutional judgments of non-judicial actors survive judicial review.<sup>183</sup> First, the Court may not take cases in which lower courts have upheld non-judicial constitutional activity. For much of its history, the Court had jurisdiction to review lower state court decisions overturning federal laws or rights, but it could not review state court decisions *upholding* such laws or rights.<sup>184</sup> Second, in most constitutional cases, the Court uses extremely deferential review. Judicial review primarily involves the application of the

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180. See generally RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 320-21 (5th ed. 2003) (noting the absence of Supreme Court jurisdiction over state court decisions of federal questions approving a claim of federal right, and over state court decisions on the basis of diversity of citizenship).

181. For the twelve month period ending on March 31, 2004, 1,654,847 cases were filed in the bankruptcy courts, Statistics Div., Admin. Office of the United States Courts, *Federal Judicial Caseload Statistics*, at Table F (Mar. 31, 2005), <http://www.uscourts.gov/caseload2005/tables/F00mar05.pdf>; 255,851 civil cases were filed in the U.S. District Courts, *id.* at Table C, <http://www.uscourts.gov/caseload2005/tables/C00mar05.pdf>; and 60,505 cases were filed in the U.S. Court of Appeals, *id.* at Table B, <http://www.uscourts.gov/caseload2005/tables/B00mar05.pdf>. During the 2004 term, the Supreme Court considered 1,727 petitions from the appellate docket, granting certiorari to sixty-nine, and 5,815 petitions from the miscellaneous docket, granting certiorari to only eleven. See *The Supreme Court—The 2004 Term: The Statistics*, 119 HARV. L. REV. 415, 426 (2005).

182. See Jonathan D. Glater, *As a Private Lawyer, Miers Left Little for the Public Record*, N.Y. TIMES, Oct. 10, 2005, at A17 (citing statistics that of eighty cases before the Supreme Court in the 2004-2005 term, only thirty-three raised questions of constitutional law, and that such numbers are typical).

183. For instance, I found that in its 2004 term the Supreme Court had three cases involving constitutional judgments of the federal government outside the criminal context. Of these cases, the Court decided at least two in favor of the government. Likewise, I found in that term thirteen cases involving the constitutional judgments of state or local actors. Of these thirteen cases, the Court decided nine in favor of the government's positions. Note, however, that this ratio shifts in the criminal context—of the three federal criminal cases involving constitutional issues, all were decided against the government, while six of eight state criminal cases involving constitutional issues were decided against the government.

184. FALLON, JR., ET AL., *supra* note 180, at 320-21 (noting that state court decisions "favorable to federal claims were . . . excluded from the Court's appellate jurisdiction" from 1789 to 1914).

rational basis test—the most deferential standard available for assessing the constitutionality of governmental action.<sup>185</sup> It is rare for the Court to strike down governmental action for lack of a rational basis.<sup>186</sup>

Third, the standing and political question doctrines have precluded judicial review of several areas of constitutional law. The standing doctrine restricts who may litigate certain constitutional claims in Article III courts.<sup>187</sup> For instance, the Court decided not to address the constitutionality of public schools' daily recitation of the Pledge of Allegiance.<sup>188</sup> By overturning on standing grounds a Ninth Circuit holding that the Pledge violated the First Amendment's prohibition against establishment of religion,<sup>189</sup> the Court left intact the words "under God," which Congress had inserted into the Pledge at the outset of the Cold War.<sup>190</sup> When a district court subsequently ruled that Ninth Circuit precedent required overturning the Pledge on Establishment Clause grounds, members of Congress wasted no time in denouncing the decision and ratifying their earlier decision to include the words "under God" in the Pledge.<sup>191</sup> Furthermore, the Court avoids reaching the merits of several matters involving the powers of non-judicial actors through the political question doctrine.<sup>192</sup>

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185. See BLACK'S LAW DICTIONARY, *supra* note 1, at 1290 ("Rational basis is the most deferential of the standards of review that courts use . . .").

186. For notable exceptions, see, for example, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (invalidating a Texas statute criminalizing certain intimate sexual conduct between two persons of the same sex on due process grounds for failing to further any legitimate state interest that could justify its intrusion on the privacy of the individual); *Romer v. Evans*, 517 U.S. 620, 624, 632 (1996) (holding as unconstitutional under equal protection an amendment to the Colorado state constitution prohibiting "all legislative, executive or judicial action at any level of state or local government" designed to protect homosexual persons on the grounds that it "lack[ed] a rational relationship to legitimate state interests"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435, 450 (1985) (holding that Texas's denial of a special use permit for operation of a group home for the mentally retarded reflected an "irrational prejudice" against the mentally retarded that violated equal protection).

187. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 58 (4th ed. 2003) ("The notion is that by restricting who may sue in federal court, standing limits what matters the judiciary will address and minimizes judicial review of the actions of the other branches of government.").

188. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5, 17-18 (2004).

189. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

190. Act of June 14, 1954, Pub. L. No. 396, ch. 297, 68 Stat. 249 (1954).

191. See 148 CONG. REC. S6101-02, S6104 (2002) (quoting various Senators, referring to the decision as "twisted" (statement of Sen. Lieberman), "nuts" (statement of Sen. Daschle), and "stupid" (statement of Sen. Reid)).

192. See, e.g., *Nixon v. United States*, 506 U.S. 224, 226-27, 234 (1993) (declining to exercise judicial review of the Senate's chosen method for trying a federal judge on impeachment charges); *Coleman v. Miller*, 307 U.S. 433, 450, 456 (1939) (leaving to Congress the decision as to whether its proposal of a constitutional amendment had "lost its vitality" due to the lapse of time

The Court has held nonjusticiable challenges to the process for ratifying constitutional amendments,<sup>193</sup> using Senate trial committees to gather evidence and take testimony for judicial impeachment trials,<sup>194</sup> and enforcing the Republican Guarantee Clause.<sup>195</sup>

Fourth, the Court defers to non-judicial precedents in such varied forms as traditions,<sup>196</sup> customs,<sup>197</sup> and historical<sup>198</sup> and administrative practices.<sup>199</sup> Tradition oftentimes refers to states' longstanding understandings about the scope of personal autonomy in certain realms of behavior or their powers to restrict or proscribe personal autonomy.<sup>200</sup> Historical practices usually refer to the federal government's longstanding or past exercises of powers over certain domains.<sup>201</sup> In *Stuart v. Laird*, the Court upheld the congressional requirement that Supreme Court Justices ride circuit in a stunning endorsement of non-judicial precedent.<sup>202</sup> As Justice William Paterson explained for the unanimous Court,

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prior to the state ratifications required to enact it); *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (declining to give judicial effect to the provisions of an international treaty when the provisions are not self-executing and Congress has not executed these provisions through the enactment of positive law).

193. See *Coleman*, 307 U.S. at 450.

194. See *Nixon*, 506 U.S. at 229-38.

195. See *Luther v. Borden*, 48 U.S. 1, 35-36, 39-40, 46-47 (1849) (declining to decide whether the charter government of Rhode Island had been displaced by a separately constituted state government whose constitution was adopted and ratified by a majority of Rhode Island voters).

196. *Id.* at 39 ("In forming the constitutions of the different States . . . the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State . . .").

197. See, e.g., Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U.L. REV. 109, 115 (1984) ("Custom has also been a source of decisional authority that has been relied upon frequently by the Court.").

198. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003) (deferring to legislative history and historical practice in upholding the Copyright Term Extension Act); *Marsh v. Chambers*, 463 U.S. 783, 786-91 (1983) (discussing practices "deeply embedded in the history and tradition of this country," but also noting that history and tradition do not vindicate constitutional violations).

199. See *supra* notes 108, 117 and accompanying text (discussing treaty authorization of a President's use of military power).

200. See, e.g., *Vacco v. Quill*, 521 U.S. 793, 807 (1997) (referring to traditional concepts of the right to bodily integrity and freedom from unwanted touching); *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997) (referring to the "long legal tradition protecting the decision to refuse unwanted medical treatment").

201. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 (2003) (referring to the "historical practice" of the Executive making postwar reparations settlements). In *Hudson v. Michigan*, 547 U.S. 586 (2006), the Court construed "changed circumstances" in police practices as an additional basis for deferring to non-judicial activities—in that case, violations of the ancient "knock-and-announce" rule. *Id.* at 599.

202. 5 U.S. 299, 309 (1803).

[P]ractice and acquiescence . . . for a period of several years, commencing with the organization of the judicial system, affords an irresistable [sic] answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. . . . [A]nd [it] ought not now to be disturbed.<sup>203</sup>

Custom—institutional or cultural habits and conventions—is a basis for decision in such diverse contexts as separation of powers, establishment of religion, international law,<sup>204</sup> and municipal liability under 42 U.S.C. § 1983. Administrative practices, which are the most common federal non-judicial activities, entail agencies' constructions of ambiguous federal statutes.<sup>205</sup> While the Court defers to these constructions most of the time,<sup>206</sup> it is even more deferential to historical practices, customs, and traditions, which it rarely overturns.<sup>207</sup>

Moreover, the Court allows the states to render final judgments on the scope of their sovereign immunity.<sup>208</sup> Eleventh Amendment jurisprudence recognizes that states may waive their immunity from being forced to pay damages in federal court.<sup>209</sup> The Court also allows states to determine the actions for which they may be held accountable under the Fourteenth Amendment's state action doctrine.<sup>210</sup>

203. *Id.*

204. *See, e.g.*, Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060 (listing "international custom, as evidence of general practice accepted as law," as a source of international law).

205. *See generally* WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1062-70 (3d ed. 2001) (describing the commonality of agencies' constructions of ambiguous federal statutes and the Court's consistent deference to them).

206. *See, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 984 (1992) (finding that the Court, before 1984, deferred to agencies in 75% of surveyed cases, but after *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), it deferred to agencies in only 59% of the cases in which it applied *Chevron's* framework).

207. For notable exceptions, see *United States v. Virginia*, 518 U.S. 515, 519 (1996) (requiring, under the Equal Protection Clause, a traditionally male-only state military institute to admit women); *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (holding that prayer at a graduation ceremony induced unwilling students to conform in violation of the Establishment Clause, despite the long-standing tradition of such a practice); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (overturning state anti-miscegenation laws as violative of Equal Protection, despite their continued prevalence and acceptance as constitutional subsequent to the passage of the Fourteenth Amendment).

208. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 663-69 (1974); *Hans v. Louisiana*, 134 U.S. 1, 10 (1890); *Louisiana v. Jumel*, 107 U.S. 711, 728 (1883).

209. *See Alden v. Maine*, 527 U.S. 706, 724 (1999) ("[T]he Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity . . .").

210. *See, e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 675-76 (1999) (holding that a court will find a waiver of immunity only if the state voluntarily invokes the Supreme Court's jurisdiction, or if it makes a "clear declaration" that it intends to

Fifth, preoccupation with judicial review sometimes blinds commentators to the Court's deference to non-judicial precedent. For instance, the dissents' stridency about the majority's activism in two recent cases deflected attention from the fact that the common link between the cases was the Court's deference to non-judicial authority. In *Gonzales v. Raich*, the Court concluded that federal law criminalizing possession and distribution of marijuana preempted states from allowing doctors to authorize their patients to use marijuana for medical purposes.<sup>211</sup> While the dissent complained that the majority had failed to give adequate deference to the states operating as laboratories,<sup>212</sup> the majority deferred to Congress's formulation of a comprehensive national policy to regulate drugs.<sup>213</sup> Similarly, in *Kelo v. City of New London*, the majority upheld a locality's decision to take private property in a relatively poor neighborhood in order to develop the land to benefit wealthier residents.<sup>214</sup> Although the dissent characterized the decision as radically departing from precedent,<sup>215</sup> the *Kelo* majority recognized that localities—non-judicial authorities—had final say about the “public uses[s]” for which they may exercise control over private property.<sup>216</sup> Localities could make more restrictive determinations of what constitutes “public use” for purposes of eminent domain, and such determinations would be just as constitutional as New London's judgment (and for the same reasons).<sup>217</sup> Similarly, *Raich* does not preclude Congress from changing its policy to exempt medical marijuana from the coverage of its drug policies.<sup>218</sup>

Similarly, in *Eldred v. Ashcroft*, the Court upheld the constitutionality of the Copyright Term Extension Act, in part, on the basis of “an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions.”<sup>219</sup> *Eldred* effectively recognized that Congress had the last word on the

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submit itself to Supreme Court jurisdiction); *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (holding that a state's sovereign immunity “is a personal privilege which it may waive at pleasure”); *Beers v. Arkansas*, 61 U.S. 527, 529 (1858) (holding that the decision for a state to waive its immunity “is altogether voluntary on the part of the sovereignty”).

211. 545 U.S. 1, 9 (2005).

212. *Id.* at 43 (O'Connor, J., dissenting).

213. *Id.* at 33 (majority opinion).

214. 545 U.S. 469, 488-90 (2005).

215. *Id.* at 494 (O'Connor, J., dissenting).

216. *Id.* at 476-83 (majority opinion).

217. *Id.*

218. *See Gonzales*, 545 U.S. at 22 (concluding that Congress acted within its authority).

219. 537 U.S. 186, 200 (2003).

scope of its power to regulate copyrights for "limited Times."<sup>220</sup> The Constitution does not compel Congress to extend repeatedly, or to stop extending, copyright terms. A different Congress could interpret its power differently.

Sixth, there are numerous subjects that the Court is unlikely to subject to judicial review. For instance, the federal impeachment process is rife with final congressional judgments on constitutional questions, such as the appropriate burden of proof, rules of evidence, and procedures for impeachment trials.<sup>221</sup> Similarly, Presidents and senators make the final, constitutional judgments on the criteria for assessing judicial, cabinet, and subcabinet nominations.<sup>222</sup> Other areas in which non-judicial actors made effectively final decisions are the structure or organization of presidential transitions,<sup>223</sup> the powers of congressional committees and their respective jurisdictions,<sup>224</sup> rulemaking within the House and the Senate,<sup>225</sup> and the reorganization of the federal government (such as the recent creation of the Department of Homeland Security<sup>226</sup>). Presidential decisions on vetoes and pardons are invariably final.<sup>227</sup>

Even when the Court uses heightened scrutiny, it does not always reject the claim.<sup>228</sup> While the Court reviewed the

220. *Id.* at 193-94 (citing U.S. CONST. art. I, § 8, cl. 8).

221. See GERHARDT, *supra* note 61, at 112-17 (discussing these and other constitutional issues arising in impeachment proceedings).

222. See Michael J. Gerhardt, *The Federal Appointments Process as Constitutional Interpretation*, in CONGRESS AND THE CONSTITUTION 110 (Neal Devins & Keith E. Whittington eds., 2005) (discussing the ways in which the Senate effects unreviewable constitutional interpretation through its authority over federal appointments).

223. See generally Jack M. Beerman & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253 (2006).

224. See generally Keith E. Whittington, *Hearing About the Constitution in Congressional Committees*, in CONGRESS AND THE CONSTITUTION, *supra* note 222, at 87 (suggesting that committees engage constitutional issues, as evidenced through their hearings).

225. Courts routinely have deferred to Congress's internal procedural rules. In *United States v. Ballin*, the Court upheld a congressional procedural rule under the rational basis test. 144 U.S. 1, 5 (1892). Since *Ballin*, lower courts have dismissed judicial challenges to procedural rules on standing and political question grounds. See, e.g., *Skaggs v. Carle*, 110 F.3d 831, 845 (D.C. Cir. 1997) (dismissing a challenge to certain House rules for lack of standing); *Hoffman v. Jeffords*, 175 F. Supp. 2d 49, 60 (D.D.C. 2001) (refusing to hear a challenge regarding a Senator's switch of political parties based on lack of standing); *Page v. Shelby*, 995 F. Supp. 23, 29 (D.D.C. 1998) (declining to hear a challenge to Senate procedural rules based on lack of standing).

226. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

227. See, e.g., *Šchick v. Reed*, 419 U.S. 256, 266 (1974) ("Presidents throughout our history as a Nation have exercised the power to pardon or commute sentences upon conditions that are not specifically authorized by statute [and] such conditions have generally gone unchallenged.").

228. See *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting *Fullilove v. Klutznick*,



constitutionality of the University of Michigan's law school admissions program under strict scrutiny, it upheld the policy.<sup>229</sup> It adopted Justice Lewis Powell's approach in his pivotal opinion in *Regents of University of California v. Bakke*<sup>230</sup> to uphold for the first time a racial preference for admission to a professional school.<sup>231</sup> Similarly, while the Court subjected the Bi-Partisan Campaign Finance Reform Bill<sup>232</sup> and Family Leave Act<sup>233</sup> to heightened scrutiny, it upheld both.

Indeed, the number of laws struck down by the Court is small. It has overturned fewer than 200 federal laws,<sup>234</sup> which averages less than one per year since the Court's inception. Even though the Rehnquist Court overturned more than thirty federal laws,<sup>235</sup> this number is tiny compared to the actual number of bills approved in either the House or Senate—and thus, at least implicitly, deemed constitutional by members of the House or Senate—during the same period.<sup>236</sup> Moreover, the Rehnquist Court struck down only a tiny fraction of the constitutional activities of political authorities besides

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448 U.S. 448, 519 (1980) (Marshall, J., concurring)); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

229. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

230. 438 U.S. 265, 314-15 (1978) (arguing, though not joined by any other members of the Court on this part of his opinion, that race “is only one element in a range of factors a university properly may consider”).

231. *Grutter*, 539 U.S. at 325.

232. See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003) (upholding the constitutionality of the Bipartisan Campaign Reform Act).

233. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding the constitutionality of the Family and Medical Leave Act).

234. As of the close of the 2005 term, the Supreme Court had struck down 165 federal laws as unconstitutional. Of those, fourteen were struck down during the 1930s; thirty-seven were struck down by the Rehnquist Court. See LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM 176-80* (4th ed. 2007) (charting Supreme Court decisions holding Acts of Congress unconstitutional between 1789 and 2005).

235. See Neal Devins, *Conservative and Progressive Legal Orders: The Majoritarian Rehnquist Court?*, 67 LAW & CONTEMP. PROBS. 63, 64 (2004) (noting that the Rehnquist Court struck down thirty-one laws between 1995 and 2002).

236. From the advent of the Rehnquist Court in 1986 through its formal end in the fall of 2006, the Senate passed 11,642 total measures, while the House passed 13,257, for a grand total of 24,899. The total number of measures passed is considerably smaller than the number of measures introduced. In approving measures, members of the House or Senate are presumably accepting their constitutionality. Of course, these numbers do not include the many other measures that members opposed on constitutional grounds. See *Résumé of Congressional Activity*, [http://www.senate.gov/pagelayout/reference/two\\_column\\_table/Resumes.htm](http://www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm) (showing the total number of bills introduced being significantly higher than the total number of bills passed) (last visited Feb. 1, 2008).

Congress. For instance, it struck down only a small number of states' constitutional judgments in its last few years.<sup>237</sup>

The Court overturns presidential judgments even more rarely. Over the past half century, the Court has overturned fewer than a dozen presidential acts, most of which involved presidential efforts to thwart judicial inquiries into their conduct.<sup>238</sup> To be sure, the Court overturned the constitutional judgments of executive officials in the Bush Administration, including President George W. Bush, in two cases—each involving the constitutional foundations for President Bush's restrictions on access to the courts by people detained during the military conflicts in Afghanistan and Iraq.<sup>239</sup> The few other cases in which the Court has overturned Presidents' actions involved presidential usurpations of legislative authority.<sup>240</sup>

## 2. The Timing of Judicial Review

The longer it takes for courts to review non-judicial precedents, the longer the precedents endure. An example of this dynamic is the Tenure in Office Act, which Congress passed to curb President Andrew Johnson's power to remove Republicans from his cabinet.<sup>241</sup> Although President Johnson vetoed the Act, Congress overrode his veto.<sup>242</sup> Subsequently, Johnson refused to comply with the act, the House impeached him, and the Senate barely acquitted him for his non-compliance.<sup>243</sup> Almost sixty years later, the Court struck down the

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237. From 1980 to 1989, the Supreme Court struck down 161 state or local laws, but this number dropped to forty-eight from 1990 to 1999. From 2000 to 2002, the Court struck down eight state or local laws, fewer than the number of federal laws struck down in the same period (ten). See EPSTEIN ET AL., *supra* note 234, at 181-207 (showing a chart of Supreme Court decisions holding state constitutional and statutory provisions and municipal ordinances unconstitutional between 1789 and 2005).

238. See, e.g., *Clinton v. Jones*, 520 U.S. 681 (1997) (holding that President Clinton could not use temporary immunity or invoke the doctrine of separation of powers to stay civil litigation against him); *United States v. Nixon*, 418 U.S. 683 (1974) (rejecting President Nixon's arguments that he did not need to comply with a court-issued subpoena).

239. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (holding that U.S. citizens being held as enemy combatants must be given opportunity to contest factual basis); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (holding that the District Court had jurisdiction to hear the case from a Guantanamo Bay detainee).

240. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 448-49 (1998) (holding that the Line Item Veto violated the Presentment Clause); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) (holding the Executive branch's seizures of privately owned factories unconstitutional).

241. See MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 46-51 (1973).

242. *Id.* at 146.

243. See generally *id. passim*.

Act,<sup>244</sup> but in the meantime, twelve Presidents and many members of Congress had to accommodate their differing opinions about its constitutionality.

The significance of the ramifications of belated judicial review is evident with respect to the ways in which the moral and ethical dilemmas raised by advancements in medical technology are handled prior to their relatively rare disposition by the Supreme Court. For instance, Oregon's assisted suicide law had been in effect for a number of years before it was challenged in front of the Court.<sup>245</sup> Moreover, the Court did not render a judgment on whether federal law preempted this state law until 2005, more than a decade after the state had enacted the legislation.<sup>246</sup> Because no court had barred implementing the statute in the meantime, almost 200 people had chosen to die pursuant to its procedures. The law was final for these people, their health care providers, and their families.

### *C. The Binding or Persuasive Authority of Non-Judicial Precedents*

Non-judicial authorities generally design their precedents to exert influence in one of two directions. First, some are designed to exert influence vertically, as binding authority imposed by superior authorities upon inferior ones. Second, some are designed to exert influence horizontally, as persuasive authority within or across equally powerful institutions. Depending on the direction of their influence, non-judicial precedents may be categorized in the following four ways:

#### 1. Vertical-Vertical Non-Judicial Precedents

Vertical-vertical non-judicial precedents operate as binding authority within the branch creating them *and* on other branches. Presidential pardons exemplify such precedents. Presidents have the unique power to pardon people for federal crimes.<sup>247</sup> Once pardons are issued, they are binding on other authorities. No other constitutional authority may undo, or undermine, a presidential pardon. Not even a subsequent President may withdraw a predecessor's pardon. Pardons bind every branch at the top, as well as every inferior federal and state official.

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244. See *Myers v. United States*, 272 U.S. 52 (1926).

245. The Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800-.897 (2003).

246. *Gonzales v. Oregon*, 546 U.S. 243 (2005).

247. U.S. CONST. art. II, § 2, cl. 1.

President Ford's pardon of Richard Nixon<sup>248</sup> illustrates the binding effect of presidential pardons. Congress lacked authority to erase the pardon through legislation.<sup>249</sup> The most that Congress could do was to hold oversight hearings, as it did, to inquire into Ford's reasons for pardoning Nixon.<sup>250</sup> But no president believes that he has the power to undo a presidential pardon made by a predecessor in office. Nor do state or federal courts claim the authority to question the terms of a pardon, and neither federal nor state prosecutors ever have prosecuted misconduct for which a person has been formally pardoned.

## 2. Vertical-Horizontal Non-Judicial Precedents

Vertical-horizontal non-judicial precedents impose binding authority from the top-down within the institutions producing them but are only persuasive authority in other institutions. Official opinions from the Attorney General are examples of vertical-horizontal precedents. The Office of Legal Counsel produces official opinions for the Attorney General in response to requests made by executive branch officers, including the President.<sup>251</sup> These opinions have strict binding authority throughout the executive branch, but they are merely persuasive authority in Congress, courts, and the states. Similarly, presidential decisions on what material to keep confidential bind the executive branch but not other branches. At most, they are persuasive authority in Congress and courts. Hence, presidential and congressional disputes over executive privilege usually are resolved through mutual accommodations reached through negotiations between Presidents and Congress.<sup>252</sup>

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248. Proclamation No. 4311, 39 Fed. Reg. 32,601 (Sept. 10, 1974).

249. See *United States v. Klein*, 80 U.S. 128, 130 (1871) (overturning a congressional enactment aimed at limiting the effects of presidential pardons, and noting that "[i]t was competent for the President to annex to his offer of pardon any conditions or qualifications he should see fit"); *Ex parte Garland*, 71 U.S. 333, 380 (1866) (holding, among other things, that the President's pardon power is "not subject to legislative control," and that "Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders").

250. *Pardon of Richard M. Nixon, and Related Matters: Hearings Before the H. Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 93d Cong. (1974).

251. See Kmiec, *supra* note 172, at 337-38 (discussing generally the job of the Office of Legal Counsel).

252. See generally LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* (2004).

### 3. Horizontal-Horizontal Non-Judicial Precedents

Horizontal-horizontal non-judicial precedents operate as persuasive authority within the institutions creating them and in other institutions. These precedents encompass what we commonly refer to as traditions, customs, or historical practices. Horizontal-horizontal non-judicial precedents came into play after Chief Justice William Rehnquist's death. President Bush had to decide initially whether he would follow the norm of not naming a sitting Justice as Chief Justice of the United States. Presidents usually appoint someone from outside the Court as Chief Justice,<sup>253</sup> in part to avoid friction among sitting Justices, who might have wanted the job or were opposed to one of their colleagues becoming Chief. President Bush chose to follow this norm.

Timing was another issue following Chief Justice Rehnquist's death: President Bush had to decide whether to fill two vacancies on the Court at the same time or to nominate a successor to the Chief Justice and not name someone to replace Justice Sandra Day O'Connor until after the Senate had confirmed Rehnquist's successor.<sup>254</sup> The circumstance was unprecedented—never before had a Chief Justice died pending hearings on a nomination to replace another Justice, and never before had a President had the opportunity to withdraw a nomination so he could renominate the person as Chief Justice. In nominating John Roberts to two different seats on the Court within a short time, President Bush made decisions that may be taken into account as persuasive authority when and if similar opportunities arise.

### 4. Horizontal-Vertical Non-Judicial Precedents

Some non-judicial precedents have horizontal effects within the institutions creating them but vertical effects on other institutions. For example, when the Senate Judiciary Committee approves judicial nominations, the decisions are not binding on the senators, who cast their votes on the floor. These decisions are regarded (indeed, formally) as recommendations for the senators to follow. When senators follow the recommendations (as they did with the Committee's recommendations of both Roberts and Samuel Alito),

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253. Of the nation's seventeen Chief Justices, only three—Edward Douglass White, Harlan Fiske Stone, and William Rehnquist—were elevated to the position from within the Court.

254. Julie Hirschfeld Davis, *Bush to Nominate Rehnquist's Successor on Court 'Promptly'; President Must Choose Nominee, Chief Justice; Transition in the Supreme Court*, BALT. SUN, Sept. 5, 2005, at 1A.

they do so because they are persuaded, not bound, to approve them. But officials in other branches are bound to accept the Committee's recommendations; they have no formal power to interfere with, or change, the recommendations.

*D. The Limited Path Dependency of Non-Judicial Precedents over Time*

Even when non-judicial precedents are designed to constrain, they have limited path dependency—they weakly control subsequent constitutional decisionmaking.

1. Beyond Standards and Rules

While judicial precedents generally are framed as rules or standards,<sup>255</sup> non-judicial precedents take many other forms. The non-judicial precedents with the greatest potential to constrain subsequent constitutional decisionmaking take the form of formal rules (such as Senate Rule XXII governing filibusters),<sup>256</sup> which generally may be amended only as they prescribe. But most non-judicial precedents are not formal rules, and most rarely explain their justifications or grounds in detail.<sup>257</sup> In many cases, much of the underlying reasoning that has gone into the making of a non-judicial precedent is not reduced to writing. Consequently, it may be difficult, if not impossible, to know why certain things either happened or did not happen in the legislative processes or at the federal or state levels.

Rational choice theory suggests that collegial institutions such as the House or the Senate will reach inconsistent, incoherent results, in part because of the different orderings and intensities of preferences among its members.<sup>258</sup> Without knowing the orderings or intensities of preferences, it may be impossible to know why Congress did what it did. Nevertheless, the outcome may take on a life of its own; an acquittal in an impeachment trial, for instance, may depend more on how subsequent generations have come to understand it than on what senators said at the time they rendered judgment. Yet, the reasons given for particular actions may also matter. Just as the significance of a judicial precedent may oftentimes depend on the

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255. See CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 1-12 (2004) (discussing the "rules and principles" that emerge from various sources and become "constitutional doctrine").

256. See *supra* note 83 and accompanying text.

257. See *supra* notes 29-30 and accompanying text.

258. See generally Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245 (1979).

quality, or persuasiveness, of its reasoning, the same could be said of non-judicial precedents. When senators explain their votes (in impeachment trials or on other matters), it makes it easier to understand why they voted as they did; however, not all senators provide such explanations.

President Clinton's acquittal in his impeachment trial is another precedent whose meaning is uncertain. At the end of Clinton's trial, only seventy-two senators formally explained their votes.<sup>259</sup> These seventy-two votes included thirty-four of the forty-five Democrats who had voted not guilty on both articles of impeachment, four of the five Republicans who had voted not guilty on both, and three of the five Republicans who had voted not guilty on the first article but guilty on the second article.<sup>260</sup> With most of the senators who voted guilty on both articles not bothering to explain their votes publicly, we do not know their precise reasoning. Moreover, we face the challenge of finding the common ground among the statements that we have. Most importantly, the fact that there have been no subsequent impeachment trials, much less any presidential impeachment trials, means that, as a precedent, Clinton's trial has literally no network effects—its value and meaning are limited because no authority, including the Senate, has had the opportunity to define its authority.

Similarly, the precise meaning or significance of the nation's second impeachment is a subject of ongoing debate. It involved District Judge John Pickering, whom the House impeached on March 2, 1803, by a vote of 45-8.<sup>261</sup> The impeachment articles charged drunkenness and profanity on the bench and the rendering of judicial opinions based neither on law nor fact. Although Pickering did not appear on his own behalf before the Senate, his son filed a petition claiming that Pickering was so ill and deranged that he was incapable of exercising any sound judgment whatsoever and that he therefore should not be removed from office for misconduct attributable to insanity. Nevertheless, the Senate voted 18-2 to accept evidence of his insanity, 19-7 to convict, and 20-6 to remove from office. Consequently, he became the first federal official to have been impeached by the House and formally convicted and removed from office by the Senate.

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259. GERHARDT, *supra* note 61, at 175 (surveying the views expressed in the written statements of senators released after Clinton's acquittal).

260. *Id.*

261. Unless otherwise cited, all relevant facts regarding Pickering's impeachment proceeding have been drawn from *id.* at 50-51.

Yet, disagreement among scholars and members of Congress persists about whether Pickering's removal established a precedent for removal based on non-indictable misconduct—i.e., misbehavior that violates some criminal law. On the one hand, Simon Rifkind, counsel for Justice William Douglas in the House's impeachment inquiry against him in 1970, suggested that Pickering was charged "with three counts of willfully violating a federal statute relating to the posting of bond in certain attachment situations, and the misdemeanors of public drunkenness and blasphemy." On the other hand, some experts claim that "no federal statute made violation of the bond-posting act a crime, nor obviously were drunkenness or blasphemy federal crimes. The Pickering impeachment [confirms] that the concept of high crimes and misdemeanors is not limited to criminal offenses."

Both of these views have merit "because the question of guilt was put in the form of asking senators whether the judge stood guilty as charged," rather than whether the acts he allegedly committed constituted impeachable offenses. The Senate's votes to convict may not reflect an acknowledgment by the Senate that violations of impeachable offenses actually were involved. Indeed, five senators withdrew from the court of impeachment when the Senate agreed to put the question in the form of "guilty as charged." Two senators—both Federalists—objected to procedural irregularities and claimed that the question put to them failed to ask whether the charges actually described high crimes and misdemeanors. John Quincy Adams claimed that the other senators who withdrew—all Republicans—objected to procedural irregularities but did not want to separate from their party by voting to acquit the judge.

A related problem with using the Pickering impeachment and removal as a precedent is that party fidelity seems to have played a major role in the Senate's votes to admit the evidence of insanity and to remove Pickering. All nineteen of the Senate's votes to acquit the Federalist judge were cast by Republicans, while Federalists cast the seven acquittal votes. Even the seemingly bipartisan vote to admit evidence on Pickering's insanity can be explained on partisan grounds: The Federalist senators may have wanted to introduce this evidence because they hoped that proof of his insanity would have led to an acquittal given their position that insanity was not an impeachable offense. The Republicans might have expected the admission of the evidence to lead to the judge's conviction because they thought it demonstrated the need to remove him before he damaged the political system any further. In any event, the party-line voting was consistent with an apparent Republican strategy to employ the impeachment



process to create vacancies in the federal judiciary by ousting Federalist judges, of which Pickering was one of the easiest to remove.<sup>262</sup>

## 2. The Absence of Rules for Constructing Non-Judicial Precedents

The absence of rules for constructing non-judicial precedents impedes their discoverability and interpretations. First, the significance of governmental inaction may be hard to define. The fact that legislatures may have failed to do certain things—such as foregoing criminal prosecution of homosexual activity on a wide scale basis—may be significant to the extent that the Court recognizes this failure as constituting a tradition. Moreover, the Senate Judiciary Committee might have failed, for undisclosed or unacknowledged reasons, to hold hearings or votes on pending judicial nominations. But the absence of a hearing does not rob the event of precedential significance. It might have been the result of a chair's decision simply not to schedule a hearing or a vote, and the Chair might have done this with or without consultation with other members of the Committee. A committee's failures to hold hearings are precedents on the basic authority of its chair to schedule matters as he sees fit.

This is hardly the extent of the legal significance that committee inaction may have. In the absence of a formal hearing, there is no occasion—and no need—for either the chair or the committee members to explain themselves. The Senate rules provide, however, that a nomination lapses and becomes void if it is not approved or acted on by the end of the legislative session in which it was made.<sup>263</sup> Senate rules invest inactivity with some significance. Failures to hold hearings or votes make the significance of inactivity malleable. Such failures can mean almost anything—or nothing, depending on the interpreter's needs. Thus, the Senate Judiciary Committee's failure to hold a hearing on President Clinton's nomination of Elena Kagan to the U.S. Court of Appeals for the District of Columbia means different things to different senators. For many senators, the failure to hold a hearing might signify nothing, as the Committee never held a hearing or vote on her nomination.<sup>264</sup> Other senators might construe the failure to hold a hearing or vote as

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262. See generally WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 127-28 (1992).

263. *STANDING RULES OF THE SENATE*, S. DOC. NO. 110-9, R. XXXI § 6, at 43-44 (2007).

264. See *Confirmation Hearing on Federal Appointments Before the S. Comm. on the Judiciary*, 108th Cong. 35, pt. 1, 11-12 (2003) (statement of Sen. Patrick J. Leahy) (noting that Kagan, a nominee to the D.C. Circuit, waited eighteen months without a hearing).

the result of the need to accommodate other pressing business or of a longstanding impasse between Democrats and Republicans over whether the court's caseload justified filling a vacant seat.<sup>265</sup> For other senators, the failure to hold a hearing for Kagan might have been the consequence of a desire to keep the seat open for the next President to fill.<sup>266</sup> The credibility of any of these interpretations depends on how well it fits the facts.

A similar interpretive challenge arises when the Judiciary Committee formally recommends not sending nominations to the full Senate. Only occasionally do committee members explain their votes before casting them. Senators tend to be most expansive in high-profile hearings, as demonstrated in the confirmation proceedings on John Roberts's nomination as Chief Justice.<sup>267</sup> With the proceedings covered by national media, senators had a strong incentive to be present for as much as possible. The committee members each had lengthy statements, and each had relatively long questions or comments to pose to the witness. In lower-profile proceedings, the record tends to be less complete. Even when senators explain their votes, they may not make full statements, and it is possible that their statements do not include all the reasons for their votes. Statements might draw from prior proceedings, not because they are binding, but because they are persuasive authority. Thus, the Senate Judiciary Committee's rejection of President Bush's nomination of Priscilla Owen to the Fifth Circuit in 2001 meant different things to Democrats and Republicans. Many Democrats construed the event as an instance in which they blocked confirmation of a nominee with a judicial ideology with which they disagreed,<sup>268</sup> while some Republicans construed Owen's rejection as driven by a petty desire for payback for Republicans' failure to confirm some of President Clinton's judicial nominees.<sup>269</sup> A similar interpretive problem arose with respect to the

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265. See *Confirmation Hearing on the Nomination of Janice R. Brown, of California, to be Circuit Judge for the District of Columbia Circuit Before the S. Comm. on the Judiciary*, 108th Cong. 463, 4 (2003) (statement of Sen. Richard J. Durbin) (citing the argument of Senate Republicans that the D.C. Circuit did not need additional justices while Kagan's nomination was pending).

266. See *Confirmation Hearing on Federal Appointments*, *supra* note 264, at 7 (citing the Committee's refusal to hold hearings on some of President Clinton's nominees).

267. See 151 CONG. REC. S10, 631-48 (daily ed. Sept. 29, 2005) (containing statements from various senators explaining the reasons for their votes on the Roberts nomination).

268. See Neil A. Lewis, *Democrats Reject Bush Pick in Battle Over Court Balance*, N.Y. TIMES, Sept. 6, 2002, at A1 (citing Owen's use of personal views on abortion in her decision-making process and her propensity to favor corporations).

269. See Audrey Hudson, *Texas Judge Rejected for the Federal Bench; Came under Fire for Being a Court 'Activist'*, WASH. TIMES, Sept. 6, 2002, at A4; Carl Hulse, *Fight on Judges and Filibusters Opens in Senate*, N.Y. TIMES, May 19, 2005, at A1.

Democrats' successful filibuster against President Bush's nomination of William Pryor to the Eleventh Circuit in 2003. Many Democrats defended the filibuster as precluding the confirmation of a conservative ideologue or activist,<sup>270</sup> while some Republicans charged that the opposition to Pryor's was based on anti-Catholic bias.<sup>271</sup>

Second, the meanings or values of non-judicial precedents, like those of judicial decisions, depend in part on how they have been cited or used in the past. The more opinions that have been expressed about the meaning of a particular non-judicial activity, the more latitude that subsequent authorities will have to choose on which, if any, of those opinions to rely. This may be true even for events that are cited or referenced frequently. Such is the case, for instance, with the full Senate's votes on judicial nominations. The significance of a particular vote depends not just on how senators construe it at the time they vote but also how subsequent senators understand it. Thus, events such as the Senate's rejections of President Washington's nomination of John Rutledge as Chief Justice and President Reagan's nomination of Robert Bork do not yet have firmly fixed network effects. While Rutledge's rejection has been cited more than enough times to make it easily discoverable, many people cite it as authority for rejecting a Supreme Court nominee because of his ideology,<sup>272</sup> while others claim that it is authority for rejecting nominees because of doubts over their sanity.<sup>273</sup> Bork's rejection stands as a watershed event in which the Senate targeted nominees because of their ideology,<sup>274</sup> payback for Bork's firing of special prosecutor Archibald Cox and other misdeeds,<sup>275</sup> and Bork's confirmation conversion in which he appeared to have abandoned prior positions he had taken in order to be

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270. See Bob Dart, *Democrats Block Vote on Judgeship*, ATLANTA J. CONST., Nov. 7, 2003, at A15.

271. See Neil A. Lewis, *Judicial Nominee Advances Amid Dispute over Religion*, N.Y. TIMES, July 24, 2003, at A17 (citing the claims of Senators Sessions and Hatch that Pryor was opposed because of his pro-life viewpoint as a "solid Catholic individual").

272. See, e.g., GERHARDT, *supra* note 121, at 51-52 (discussing the impact of Rutledge's refusal to support the Jay treaty).

273. See, e.g., HENRY FLANDERS, *THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT* 641-42 (1875) (blaming Rutledge's rejection on the "condition of his intellect," which was common knowledge, and noting that this rejection likely put an end to any of his remaining sanity).

274. See NORMAN VIEIRA & LEONARD GROSS, *SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS* 247 (1998) (indicating the clear precedent Bork's confirmation hearings set for Senate rejections of nominees for solely ideological reasons).

275. See GERHARDT, *supra* note 121, at 163 (citing Bork's opposition to the 1964 Civil Rights Act and his actions against the first special Watergate prosecutor).

confirmed.<sup>276</sup> Others believe that it resulted from the convergence of many factors, including President Reagan's belated defense of Bork against public attacks<sup>277</sup> and Bork's alienation of many senators during his public testimony.<sup>278</sup>

Third, non-judicial precedents bind less forcefully because of the norm allowing members the freedom to make independent judgments on constitutional matters.<sup>279</sup> In practice, this means that legislators are free to challenge procedures or prior judgments (made by committees or the entire bodies) that they regard as unconstitutional. Their independence extends to factfinding and figuring out what standard governs their decisionmaking in different contexts. In Supreme Court confirmation hearings, senators decide what criteria nominees must meet.<sup>280</sup> Similarly, in removal trials, senators decide on the applicable burdens of proof and evidentiary rules.<sup>281</sup> Senators may feel obliged to follow their earlier practices in addressing the same constitutional question(s), but they may change their minds for many reasons, including party fealty, short-term political expediency, and their conceptions of what is in the nation's best interests.<sup>282</sup>

The limited path dependency of non-judicial precedents does not mean that precedents lack influence. As Part III shows, they perform other important functions in constitutional law.

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276. ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 241-46 (1989).

277. GERHARDT, *supra* note 121, at 83.

278. See BRONNER, *supra* note 276, at 275-76 (recounting Bork's description of the Supreme Court as "an intellectual feast," confirming the fear of many that Bork "just wanted to play with ideas" and was unaware "that beyond those elegant intellectual constructs, the lives of real people hung in the balance").

279. See Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 743 (1985) (arguing that the political process is best served when members of Congress judge constitutional issues independently because constitutional questions often have political and social impact).

280. GERHARDT, *supra* note 121, at 314.

281. GERHARDT, *supra* note 61, at 112-16.

282. For example, Senate-majority leader Bill Frist, who has vigorously protested the use of the filibuster on judicial nominees, had participated in filibusters against President Clinton's judicial nominees previously. See DEMOCRATIC POLICY COMMITTEE, *THE REPUBLICAN FLIP-FLOP ON FILIBUSTERS* (2003), [http://democrats.senate.gov/dpc/dpc-new.cfm?doc\\_name=sr-108-1-199](http://democrats.senate.gov/dpc/dpc-new.cfm?doc_name=sr-108-1-199) (citing Frist's votes against cloture and for indefinite postponement of a confirmation vote for Richard Paez, nominated to the Ninth Circuit).

## III. THE MULTIPLE FUNCTIONS OF NON-JUDICIAL PRECEDENTS

Social scientists generally presume not only that precedent is synonymous with judicial decision but also that the sole meaningful function of precedent is constraint. In fact, non-judicial precedents perform many functions besides constraint and influence the law in myriad ways.

*A. Modalities of Argumentation*

Generally, precedent is one of the traditional modes of constitutional argument.<sup>283</sup> Justices and many other public officials are trained in the law and thus familiar with its special language, which is expressed in and through precedents. Law schools train students to read cases and to argue from case law. Just as importantly, practitioners, whether in the public or private sector, are deeply immersed in the art of reading cases. When people steeped in the law become public authorities, they enter office prepared to think and to argue in terms of precedent. They not only appreciate that precedent-based arguments are an important stock in trade but also are aware that a natural part of their job is to construct precedents. Examples abound of non-judicial authorities making precedent-based arguments. For instance, precedent was an important basis asserted for the "constitutional option" to ban judicial filibusters.<sup>284</sup>

Similarly, precedent was an important mode of argumentation during President Clinton's impeachment proceedings.<sup>285</sup> The critical question before members of Congress was the extent to which Clinton's misconduct was the same as the misconduct for which several judges had been impeached and removed from office. For those urging his ouster from office, Clinton's misconduct was identical to that for which these three judges had been ousted from office in the

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283. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7-8, 93 (1982) (describing judicial but not non-judicial precedent as one the six modalities through which constitutional arguments may be made).

284. See Gold & Gupta, *supra* note 85, at 220-26 (recounting the initial introduction of the "constitutional option" by Senator Walsh, who cited the Constitution, past practices of the Senate, and general parliamentary procedure for support).

285. See, e.g., 145 CONG. REC. S1337, 1355 (1999) (statement of Rep. McCollum) ("Can you imagine how damaging that would be to our constitutional form of government, to set the precedent that no President will be removed from office for high crimes and misdemeanors unless polls show that the public wants that to happen?"); 144 CONG. REC. H11774, 11800 (1998) (statement of Sen. Lofgren) ("By [voting for conviction,] . . . you will set the dangerous precedent that the certainty of presidential terms, which has so benefited our wonderful America, will be replaced by the partisan use of impeachment . . .").

1980s: Harry Claiborne for income tax evasion and, thus, for misconduct that had no formal connection to his duties as a judge, Alcee Hastings for perjury, and Walter Nixon for making false statements to a grand jury.<sup>286</sup> Clinton's critics further likened his misconduct to the obstruction of justice charge in the second impeachment article approved by the House Judiciary Committee against Richard Nixon.<sup>287</sup> In contrast, Clinton's defenders distinguished his misconduct from that of removed officials. They likened his behavior either to Richard Nixon's alleged income tax evasion, which the House Judiciary Committee chose not to make the basis of an impeachment article,<sup>288</sup> or to Andrew Johnson's misconduct—failing to abide by the Tenure in Office Act—of which the Senate acquitted him.<sup>289</sup>

### *B. Agenda Setting*

Non-judicial precedents convey agendas just as judicial precedents do. Non-judicial actors send signals to courts, but not all their signals are sent through precedents. Non-judicial authorities send signals in part to make the Court aware of pertinent non-judicial precedents, as may have been the case with efforts in the 1990s to enact habitual offender laws<sup>290</sup> or more recent efforts to regulate same-sex marriages.<sup>291</sup> Non-judicial actors also seek to construct precedents to influence not only the agendas of their respective states

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286. See 145 CONG. REC. S1791, 1792-93 (1999) (statement of Sen. Sessions) (calling for Clinton's impeachment as consistent with these historical precedents).

287. See 145 CONG. REC. S869, 873 (1999) (statement of Rep. Canady) (noting that the Judiciary Committee used the articles of impeachment drafted against Nixon to draft the articles against Clinton).

288. See 145 CONG. REC. S1775, 1778 (1999) (statement of Sen. Sessions) (citing the argument that Nixon's alleged tax evasion was not an impeachable offense because it was not directly related to one of the President's duties); see also Sen. Patrick J. Leahy, *Procedural and Factual Insufficiencies in the Impeachment of William Jefferson Clinton*, reprinted in 145 CONG. REC. S1564, 1588 (1999) (citing Professor Tribe's argument that Clinton's behavior, like Nixon's tax evasion, presents no threat of becoming a model of emulation).

289. See, e.g., *Senator Joseph R. Biden's Comprehensive Statement on Impeachment Deliberations*, reprinted in 145 CONG. REC. S1462, 1481 (1999) (arguing that Clinton's impeachment proceedings, like Johnson's, were motivated by "policy disagreements and personal animosity").

290. Cf. Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 705 (2006) (explaining that, between 1993 and 1995, twenty-six states and the federal government enacted habitual offender laws).

291. See Christine Vestal, *Gay Marriage Decisions Ripe in 2 Courts*, STATELINE.ORG, Mar. 1, 2007, <http://www.stateline.org/live/details/story?contentId=20695> (surveying state laws on same-sex marriage).

but also the agendas of other states (and the federal government), as has been the case with the spate of state referenda and constitutional amendments restricting same-sex marriage.<sup>292</sup> With these enactments, state authorities have tried to do many things at once—make a point, appease important constituencies, encourage other states to follow suit, fortify their marriage laws from judicial challenges, and bolster (or impede) arguments that tradition supports prohibitions of same-sex marriage.

### *C. Facilitating Constitutional Dialogues*

It is quite common for constitutional scholars to analogize judicial review to a dialogue.<sup>293</sup> The idea is that judicial precedents are instrumental to an exchange of opinions about questions of constitutional meaning and design among the Court, political leaders, and the public.<sup>294</sup> The dialogue may serve many different ends, not the least of which is educating the public about constitutional law.

The late Alexander Bickel proposed one of the best known theories of precedent as facilitating constitutional dialogue. He argued, "Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives."<sup>295</sup> For instance, *Brown v. Board of Education*<sup>296</sup> is often characterized as deliberately framed to foster a national dialogue about the constitutionality of state-mandated segregation. As Robert Burt explains, "[T]he justices acknowledged among themselves that, in pragmatic terms at least, nothing would follow from the *Brown* decision unless support voluntarily came from the President and Congress."<sup>297</sup> The Court in *Brown* thus asked for briefing on the question whether the framers of the Fourteenth Amendment understood that "future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish" state-mandated

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292. *See id.*

293. *See, e.g.,* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 64-84 (1988) (discussing several examples of forces external to the courts that influence constitutional interpretation); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 668-70 (1993) (explaining how the courts synthesize society's views and turn them back to society for further discourse).

294. *See, e.g.,* Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 966-69 (1992) (commenting on the literature on the Court as educator); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (providing a well-known defense of the Court as educator on constitutional questions).

295. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91 (1970).

296. 347 U.S. 483 (1954).

297. ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 295 (1992).

segregation in public schools, even if “neither the Congress in submitting nor the states in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools.”<sup>298</sup> *Brown* required the support of the executive and legislative branches to ensure that its decision became law.

Robert Post agrees that judicial decisions are instrumental to public dialogues about constitutional matters. For instance, he construes the “best interpretation” of *Lawrence v. Texas*, which struck down Texas’ anti-sodomy law, “as the opening bid in a conversation that the Court expects to hold with the American public. The Court has advanced a powerful and passionate statement that is plainly designed to influence the ongoing national debate about the constitutional status of homosexuality.”<sup>299</sup>

Post envisions a dialogue that shapes and is shaped by American culture, which he defines as “the beliefs and values of nonjudicial actors.”<sup>300</sup> Although he recognizes that culture “comes in myriad different guises,” he argues that “constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and regulates culture.”<sup>301</sup> Post points to the Rehnquist Court’s decisions construing the scope of Congress’s power pursuant to section five of the Fourteenth Amendment as demonstrating “that the Court in fact commonly constructs constitutional law in the context of an ongoing dialogue with culture, so that culture is inevitably (and properly) incorporated into the warp and woof of constitutional law.”<sup>302</sup> The Court is not “autonomous from culture.”<sup>303</sup> Instead, it “defines the substance of constitutional law in the context of the beliefs and values of nonjudicial actors.”<sup>304</sup>

But there are many public exchanges in which the Court is peripheral or not involved. Many of these may be designed to educate the public, or others, about different constitutional issues or procedures. For instance, judicial nominees may learn from prior judicial confirmation hearings what they should say (or should not say) to get confirmed by the Senate. The Senate’s confirmation hearings on Robert Bork’s nomination as Associate Justice have been

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298. *Id.* at 296.

299. Post, *supra* note 2, at 104-05 (citation omitted).

300. *Id.* at 8.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*



described as a seminar on constitutional law.<sup>305</sup> In its aftermath, Senator Joseph Biden pointed to those hearings as an example of the proper functioning of the Senate on Supreme Court nominations.<sup>306</sup> In the midst of the confirmation hearings on John Roberts's nomination as Chief Justice, Republican and Democratic senators disagreed over the extent to which the earlier confirmation hearings on Ruth Bader Ginsburg's nomination to the Court provided an example of either a candid or a reticent nominee.<sup>307</sup> Senators treated her hearings as instructive on how forthcoming a Court nominee ought to be before the Senate Judiciary Committee.<sup>308</sup> Moreover, the Bork confirmation hearings often are construed as a demonstration of the problems that inhere when a nominee is too candid and expansive in responding to Judiciary Committee questions.<sup>309</sup> In an apparent attempt to define the significance of his own confirmation as a precedent, Chief Justice Roberts, immediately after being sworn into office, told his audience what lesson his confirmation had taught—that judging is distinct from politics.<sup>310</sup> The Roberts hearings and preceding ones influenced the next Supreme Court confirmation hearings, in which Justice Alito followed the examples of Chief Justice Roberts and Justice Ginsburg in answering questions, and senators from both sides tried to educate the (listening) public about the nominee's virtues or flaws, the Court, and the proper scope of questioning.<sup>311</sup>

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305. See Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1901 n.28 (2004) (describing the nation's interest in the Bork confirmation hearings due, in part, to its extensive discussion of constitutional protections for "unenumerated rights").

306. See Joseph R. Biden, *The Constitution, The Senate, and the Court*, 24 WAKE FOREST L. REV. 951, 954-56 (1989) (arguing that the Senate should be able to reject judicial nominees on the basis of their judicial philosophies).

307. See 151 CONG. REC. S10,461, 10,467-68 (daily ed. Sept. 27, 2005) (statement of Sen. Graham) (reciting Justice Ginsburg's refusals to answer questions in her own confirmation hearings). But see 151 CONG. REC. S9908, 9909 (daily ed. Sept. 12, 2005) (statement of Sen. Boxer) (suggesting that Justice Ginsburg was far more forthcoming than Republican senators at the Roberts hearing were suggesting).

308. 151 CONG. REC. S9211, 9212-13 (daily ed. July 28, 2005) (statement of Sen. Hatch) (urging the application of the Ginsburg rule—"no hints, no forecasts, no previews"—at the Roberts hearing).

309. See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* x-xi (1994) (suggesting that confirmations based solely on the "direction in which the minds of our Justices should be closed" are damaging judicial independence).

310. John G. Roberts, Chief Justice, President's Remarks at Swearing-In Ceremony of Chief Justice Roberts (Sept. 29, 2005), <http://www.whitehouse.gov/news/releases/2005/09/20050929-3.html> ("I view the vote this morning as confirmation of what is for me a bedrock principle, that judging is different from politics . . .").

311. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 277, at 18 (2006) (statement of Sen. Joseph R. Biden).

Non-judicial precedents were a major concern in a more recent separation-of-powers conflict. The House and Senate Judiciary Committees each scheduled oversight hearings to investigate inconsistent statements made by Attorney General Alberto Gonzales (and other administration officials) about President George W. Bush's firings of eight United States Attorneys for political reasons, rather than for poor performance.<sup>312</sup> In the course of the hearings, one current and two former White House officials refused to comply with subpoenas to testify before the House and Senate Judiciary Committees.<sup>313</sup> Fred Fielding, the Chief White House Counsel, explained their refusals on the grounds that forcing them to testify would violate the well-settled principle of executive privilege.<sup>314</sup> In response to Fielding's (and the officials' private counsels') repeated assertion of this principle, the Chairman of the House Judiciary Committee, John Conyers, Jr., urged the full House to vote to hold the officials in contempt based, in part, on the fact that "sitting and former White House officials have testified before Congress numerous times." In fact, he cited one study that indicated "approximately 74 instances where serving White House advisers had testified before Congress since World War II."<sup>315</sup> In a subsequent letter to Senators Patrick Leahy and Arlen Specter of the Senate Judiciary Committee, White House Counsel Fielding explained that the refusal of former White House adviser Karl Rove to testify was based in part on the need to establish a precedent that would benefit future presidents.<sup>316</sup>

As this separation-of-powers example shows, some constitutional conflicts involve more than exchanges of constitutional

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312. See Bob Dart & Ken Herman, *Senators OK Rove, Miers Subpoenas*, AUSTIN AM. STATESMAN, Mar. 23, 2007, at A01.

313. See Memorandum from John Conyers, Jr., Chairman, House Comm. on the Judiciary, to Members of the Committee on the Judiciary (July 24, 2007), available at [http://media.washingtonpost.com/wp-srv/politics/documents/contempt\\_memo\\_072407.pdf](http://media.washingtonpost.com/wp-srv/politics/documents/contempt_memo_072407.pdf); Press Release, U.S. Senator Patrick Leahy, Senate Judiciary Committee Approves Contempt Citations for Rove, Bolton in Bipartisan Vote (Dec. 13, 2007), available at <http://leahy.senate.gov/press/200712/121307a.html>.

314. See Letter from Fred Fielding, Counsel to the President, to Patrick Leahy, Chairman, Senate Comm. on the Judiciary, and John Conyers, Jr., Chairman, House Comm. on the Judiciary (June 28, 2007).

315. See Conyers, *supra* note 313, at 41-42 (citing Harold C. Relyea & Todd B. Tatelman, *Presidential Advisers' Testimony before Congressional Committees: An Overview*, CRS Report for Congress Order Code RL 31351, Apr. 10, 2007).

316. See Letter from Fred Fielding, Counsel to the President, to Patrick Leahy, Chairman, and Senator Arlen Specter, Senate Comm. on the Judiciary (Aug. 1, 2007) ("[T]he President remains committed to protecting the ability of future Presidents to ensure that the Executive's decisions reflect and benefit from the candid exchange of informed and diverse viewpoints and open and frank deliberations that such a privilege provides.").

viewpoints. Some dialogues have ramifications for the structure of government. Consequently, the next Section examines the different ways in which non-judicial precedents influence constitutional structure.

#### *D. Shaping Constitutional Structure*

Non-judicial precedents clarify and shape constitutional structure in two significant ways. First, the organizations of the executive and legislative branches, administrative agencies, and state governments depend largely on the discoverable constitutional judgments of Presidents, members of Congress, administrative officials, and state leaders. Moreover, non-judicial precedents shape the federal courts through choices made about their composition, funding, and jurisdiction. This is not to mention how, as previously discussed, judicial doctrine is informed by non-judicial precedents.<sup>317</sup>

Second, non-judicial precedents define the channels through which certain decisions must go in order to be lawful.<sup>318</sup> For example, Presidents have worked out with Congress different options for executing international trade agreements. The first option is to execute international agreements by treaty. Ratification of treaties requires a vote of approval by at least two-thirds of the Senate,<sup>319</sup> but questions regarding negotiation and termination of treaties have been left largely to the political branches to work out between themselves. Over time, Presidents have claimed the prerogative to terminate and to negotiate treaties, though both often are done with substantial congressional consultation.<sup>320</sup>

A second way to create international agreements is through executive agreement. Although the Constitution does not specifically mention executive agreements, they were known in President Washington's day and the United States commonly uses them to establish international agreements.<sup>321</sup> Congress has recognized the constitutionality of negotiating executive agreements by enacting the Case Act, which requires the Secretary of State to transmit the text of

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317. See *supra* notes 196-207, 295-304 and accompanying text.

318. See Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1106-14 (2003).

319. U.S. CONST. art. II, § 2.

320. See JOHN N. MOORE, *THE NATIONAL LAW OF TREATY IMPLEMENTATION* 378-405 (2001).

321. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 HARV. L. REV. 801, 820 (1995).

agreements other than treaties to each chamber for informational purposes.<sup>322</sup>

There are three types of unilateral executive agreements. First, treaty-based executive agreements are made pursuant to treaties.<sup>323</sup> They enjoy the same legal status as the treaties that authorize them so long as they are consistent with, and within the scope of, those treaties. Second, congressional-executive agreements are those authorized by statute. These agreements are complete alternatives to treaties.<sup>324</sup> They are approved, not by a supermajority vote in the Senate, but rather by majority vote in each chamber of Congress. Like treaties, these agreements (including NAFTA) may become the supreme law of the land and thus supersede inconsistent state laws and any inconsistent provisions in earlier treaties, other international agreements, or statutes. Third, executive agreements are those international agreements that a President makes solely under his own authority.<sup>325</sup> Thus, the President, as Commander in Chief, may make armistice agreements. The question whether particular agreements are lawful international agreements is usually determined outside of the courts. But even when the agreements are challenged, courts generally have deferred to national political leaders. For instance, the Court has held that a President's authority to recognize foreign governments is sufficient to authorize unilateral-executive agreements to settle issues as necessary to establish diplomatic relations.<sup>326</sup>

Also, non-judicial precedents largely govern how the nation may go to war.<sup>327</sup> First, there are declarations of war, which usually follow the incidence of war and are used to recognize preexisting states as adversaries.<sup>328</sup> Declarations also might initiate hostilities if they were, for instance, in the form of ultimata. Second, statutes may become the basis on which a President validly may commit the armed forces to combat without returning to Congress for further authorization.<sup>329</sup> Third, joint resolutions may provide a basis for using military force.<sup>330</sup> In recent years, joint resolutions authorized military

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322. Pub. L. No 92-403, 86 Stat. 619 (codified at 1 U.S.C. § 112b (2006)).

323. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. f (1987).

324. *Id.* § 303 cmt. e.

325. *Id.* § 303 cmt. g.

326. *See United States v. Belmont*, 301 U.S. 324, 330 (1937).

327. *See generally* W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* 9 (1981).

328. Bobbitt, *supra* note 111, at 1393.

329. *Id.*

330. *See id.* at 1365 (discussing the Gulf of Tonkin Resolution and the commitment of armed forces to the conflict based on that Resolution).

actions in Kuwait, Afghanistan, and, most recently, Iraq. Fourth, Presidents may unilaterally deploy military forces to rebuff imminent threats to the U.S. military, national security, Americans abroad, or civil order.<sup>331</sup> The question whether something constitutes an imminent threat is left exclusively to the discretion of non-judicial actors, and thus the only pertinent precedents are made by non-judicial actors.

### *E. Historical Functions of Precedents*

Non-judicial precedents perform several historical functions. First, they make constitutional history, as was the case with the series of congressional regulations in the territories before the Civil War.<sup>332</sup> Whether these laws either provoked or delayed secession, they were the product of extensive congressional debates over the extent of Congress's regulatory power over slavery in the territories.

Second, precedents *are* history in the making. President Thomas Jefferson's decision to forego congressional approval for the Louisiana Purchase not only significantly expanded the United States but also set an important precedent on the necessity of getting congressional approval for similar acquisitions in the future.<sup>333</sup> Similarly, President Jefferson's decision to direct military force against the Barbary pirates without congressional approval helped to eliminate a threat to American commerce and lives and also was one of the earliest in a series of unilateral presidential initiatives to employ military force without explicit congressional approval.<sup>334</sup> More recently, Southern resistance to civil rights legislation through filibuster explains the failure of such legislation to pass the Senate from the Reconstruction era until 1957.<sup>335</sup>

Third, non-judicial precedents chronicle constitutional history. Many non-judicial actors reach historical findings or produce their own histories of pertinent matters. For instance, many of the official memoranda of the Justice Department's Office of Legal Counsel

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331. *Id.* at 1394.

332. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801-1829*, at 232-49 (2001).

333. *Id.* at 112-13.

334. *Id.* at 124.

335. See ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 683-1012 (2002) (discussing the fact that no federal civil rights legislation was passed from the Civil Rights Act of 1875 until the Civil Rights Act of 1957, with the filibuster as the main tool for blocking such legislation).

include the office's own historiography on pertinent issues.<sup>336</sup> Thus, its opinions are important for the counsel and for the historical support they provide. Similarly, in preparation for its hearings on President Nixon's misconduct, the eminent historian C. Vann Woodward prepared a history of impeachment for the House Judiciary Committee that still serves as one of the most important resources available for understanding the origins and scope of the federal impeachment process.<sup>337</sup>

Indeed, non-judicial authorities produce valuable distillations of non-judicial precedents. The Congressional Record is replete with Congress's prior constitutional activities, which can be assembled by anyone. Consequently, there are several noteworthy compilations of congressional precedents.<sup>338</sup> Moreover, members of Congress may direct constitutional questions to the Congressional Research Service, which routinely produces memoranda describing and analyzing pertinent precedents. In addition, presidential decisions are reported in *The Messages and Papers of the President*, which includes executive orders, veto messages, State of the Union messages, and other official presidential directives or actions. Different units in the executive branch as well as the White House Counsel's Office also compile useful distillations of precedent. They may record their own past judgments or perhaps longer distillations of relevant precedents for some desired action(s). For example, in 1966 the State Department Legal Adviser's Office produced a memorandum collecting more than 125 incidents in which the President used the armed forces abroad without obtaining prior congressional authorization.<sup>339</sup>

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336. See, e.g., *Deputization of Members of Congress as Special Deputy U.S. Marshals*, 18 Op. Off. Legal Counsel 125 (1994) (arguing that deputizing members of Congress as special Deputy U.S. Marshals conflicts with historical practices); *Recess Appointments During an Intrasession Recess*, 16 Op. Off. Legal Counsel 15, 16 (1992) (arguing that past practice indicates presidents may exercise recess appointment power during intra-session recesses of eighteen days).

337. See generally C. VANN WOODWARD, *RESPONSES OF THE PRESIDENT TO CHARGES OF MISCONDUCT* (1974).

338. See generally 6-11 CLARENCE CANNON, *CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES INCLUDING REFERENCES TO PROVISIONS OF THE CONSTITUTION, THE LAWS, AND DECISIONS OF THE UNITED STATES SENATE* (1935); 10-16 LEWIS DESCHLER & WILLIAM HOLMES BROWN, *DESCHLER-BROWN PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES*; LEWIS DESCHLER, *PROCEDURE IN THE U.S. HOUSE OF REPRESENTATIVES*, 97<sup>TH</sup> CONGRESS: A SUMMARY OF THE MODERN PRECEDENTS AND PRACTICES OF THE HOUSE 86<sup>TH</sup> CONGRESS-97<sup>TH</sup> CONGRESS (1982); 1-6 ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, INCLUDING REFERENCES TO PROVISIONS OF THE CONSTITUTION, THE LAWS, AND DECISIONS OF THE UNITED STATES SENATE*.

339. Memorandum from the Office of the Legal Advisor, U.S. Dep't of State, *The Legality of United States Participation in the Defense of Viet-Nam* (1966), reprinted in 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 583, 597 (Richard A. Falk ed., 1968).

Last but not least, non-judicial precedents are the means by which non-judicial actors try to put themselves on the right side of history. For example, in passing non-binding resolutions, the House of Representatives may have been trying to align themselves with what they regard as the likely verdict of history on the Iraq War.<sup>340</sup>

### *F. Shaping National Identity*

One conventional mode of constitutional argument is *ethos*, or arguments about what makes the American people or nation distinctive. Non-judicial precedents are instrumental in constructing national identity. For instance, “manifest destiny” was central to how Americans viewed their nation in the first half of the nineteenth century; it encapsulated the country’s drive to acquire new territories and expand dominion over what has become the continental United States.<sup>341</sup> Similarly, the “rule of law,” whose vindication, many people believed, required the removal of Bill Clinton is another, essential component of the identity or character of this nation.<sup>342</sup> Moreover, it is common to measure the legality of the Bush administration’s warrantless wiretapping and techniques in interrogating detainees on how well they fit our national character or identity.<sup>343</sup> Political leaders’ repeated declaration of their commitment to appointing judges “who will interpret the law and not legislate from the bench” is an obvious effort to fit this conception of judging into our national identity. Similarly, Chief Justice John Roberts’s analogizing of judging to umpiring tapped into a common perception in our culture of how judges should act.

Additionally, non-judicial precedents shape the background norms or default rules in constitutional adjudication. When Justices

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340. See, e.g., Carol Lochhead, *Dems in Congress Up Ante on the War*, S.F. CHRON., Mar. 15, 2007, at A1.

341. See generally ANDERS STEPHANSON, *MANIFEST DESTINY: AMERICAN EXPANSIONISM AND THE EMPIRE OF RIGHT* (1995); ALBERT K. WEINBERG, *MANIFEST DESTINY: A STUDY OF NATIONALIST EXPANSIONISM IN AMERICAN HISTORY* (1935).

342. See, e.g., RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT WILLIAM JEFFERSON CLINTON* 155 (1999) (“[The] rule of law values . . . [breached by Clinton are] important ingredients in America’s success; they are essential to the freedom and wealth that distinguish the United States from most other nations. Because America is so heterogeneous, it relies very heavily on law to hold everything together.”).

343. See, e.g., Editorial, *Spying on Americans*, WASH. POST, Dec. 18, 2005, at B06 (asserting that “[t]he tools of foreign intelligence are not consistent with a democratic society”); Editorial, *The War President: Spying without Oversight No Mere Matter of Trust*, DETROIT FREE PRESS, Dec. 20, 2005, at 10 (criticizing President Bush’s policy of warrantless wiretapping after first declaring that “[n]othing is more fundamental to the American system of government than the freedom of individuals against the heavy hand of government”).

acknowledge these, they are revealing (perhaps unconsciously) the non-judicial beliefs or values on which they are relying to decide constitutional questions. Among the default rules or norms that Justices have derived from our culture (and which they may view as fundamental to our national character or identity) are Justice Antonin Scalia's certitude that legislative committee reports primarily are drafted to influence judicial construction;<sup>344</sup> Justice Clarence Thomas's default rule that constitutional ambiguities or gaps ought to be construed in favor of state sovereignty;<sup>345</sup> and Justice John Paul Stevens's default rule that constitutional ambiguities or gaps ought to be construed in favor of federal authority.<sup>346</sup>

### *G. Implementing Constitutional Values*

One of precedent's most important functions is implementing the Constitution. The Constitution is not self-executing; its various provisions did not spring forth spontaneously at the moment of ratification. Instead, the public, working in concert with national and state authorities, made the Constitution operational. The institutions that the Constitution authorizes materialize only after people have put them into effect. The interaction of judicial and non-judicial precedents is instrumental to affecting constitutional directives and guarantees. The Court, for instance, did not come into being (or receive its funding, or even the building it occupies) without the aid of other authorities. Moreover, the Court must rely on the other branches to enforce its opinions; it has had to turn more than once to the President for enforcement of its decrees. Meanwhile, the political

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344. See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (Scalia, J., concurring in part and concurring in the judgment) ("As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references [in the Committee Report on which the majority relies] were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.").

345. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 847-48 (Thomas, J., dissenting) ("As far as the Federal Constitution is concerned . . . the States can exercise all powers that the Constitution does not withhold from them. The Federal Government and the States thus face different default rules: Where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it. These basic principles are enshrined in the Tenth Amendment.").

346. See, e.g., *id.* at 805 (majority opinion) ("The Tenth Amendment . . . provides no basis for concluding that the States possess reserved power to add qualifications to those that are fixed in the Constitution . . . . In the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist.").



branches are expected to keep each other in check. At the same time, each is exploring the outer boundaries of its respective powers.

The difficulty with much constitutional scholarship is that it fails to account for, much less examine, how the interplay between judicial and non-judicial precedents, or among non-judicial precedents, affects the implementation of constitutional ideals. In the final Part, I consider the ramifications that the phenomena of non-judicial precedents pose for understanding the most troubling questions in constitutional theory, including why constitutional values are not implemented perfectly.

#### IV. THE NORMATIVE RAMIFICATIONS OF NON-JUDICIAL PRECEDENTS

Imperfect implementation of constitutional values is one of three significant, confounding constitutional dilemmas. Two other, more longstanding problems are whether the Constitution requires or allows judicial supremacy and how to resolve the counter-majoritarian difficulty posed by unprincipled judicial interference with democratic decisionmaking. Below, I explain how non-judicial precedents help to resolve each of these issues.

##### *A. Judicial Non-Supremacy*

For many reasons, it is a mistake to think that the Constitution authorizes or allows judicial supremacy. First, as I have shown, non-judicial precedents are not only far more extensive than judicial precedents and just as enduring, but they also shape the Court and its doctrine.

Second, judicial supremacy is problematic because it will discourage non-judicial actors from taking their own, independent constitutional interpretation seriously. The political checks on the Court—including congressional regulation of federal jurisdiction funding of the courts, Presidents' nominating powers, the Senate's "Advice and Consent" authority,<sup>347</sup> and the impeachment processes—are meaningful only as long as they actually keep the Court in check. But in a regime of judicial supremacy, they would not do so. Presidents and members of Congress would have little if any incentive to be cautious, or responsible, when interpreting the Constitution; they would expect the Court to do all the heavy lifting in constitutional interpretation. Judicial supremacy demotes the leaders

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347. See U.S. CONST. art. II, § 2, cl. 2.

of the other branches to subordinate actors in constitutional construction.

Third, judicial supremacy exacts a big price, for it comes at the expense of popular sovereignty. "We the People" are the ultimate sovereign in our constitutional order,<sup>348</sup> but judicial supremacy leaves us with no meaningful opportunity to participate in constitutional interpretation, except perhaps through efforts to amend the Constitution. In a regime in which the people are at least as important to constitutional construction as the Court, the people will become more active (and interested in participating) in constitutional dialogues when they know their participation matters. This was evident with two recent exercises of direct democracy. On November 7, 2006, eight states enacted measures similar to those in twenty-seven other states restricting their governments' abilities to take private property for private redevelopment.<sup>349</sup> These measures are repudiations of the Court's decision in *Kelo v. City of New London* to defer to a city's determination that there was a "public use" for the taking of private property to benefit private developers because of the city's "broad latitude in determining what public needs justify the use of the takings power."<sup>350</sup> Similarly, in the past three years, only one state—Arizona—out of twenty-eight rejected proposed constitutional amendments restricting same-sex marriage.<sup>351</sup> These efforts probably would not occur or would be meaningless in a regime of judicial supremacy.

Judicial supremacy also cannot be squared with the Court's inability to settle the most pressing constitutional controversies. The most serious constitutional disputes are crises that arise when public authorities disagree over whether the Constitution provides the means for settling a dispute. For instance, the Court did not determine how the House should resolve the 1800 presidential election in which Thomas Jefferson and Aaron Burr tied in the Electoral College.<sup>352</sup> Instead, the House brokered a deal in favor of Jefferson and then joined the Senate in successfully proposing the Twelfth Amendment.<sup>353</sup> Nor did the Court resolve the problem of secession.

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348. See U.S. CONST. pmbl. ("We the people of the United States . . .").

349. Editorial, *Ballot Questions Reveal Public Moods*, LAS VEGAS REV.-J., Nov. 10, 2006, at 10B.

350. 545 U.S. 469, 482-83 (2005).

351. Monica Davey, *Voter Initiatives: Liberals Find Rays of Hope in Ballot Measures*, N.Y. TIMES, Nov. 9, 2006, at P1.

352. See ACKERMAN, *supra* note 175, at 74-76.

353. See generally TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804* (1994).

Non-judicial actors settled that great dilemma through a series of actions, including the Civil War, President Lincoln's consolidation of presidential emergency powers, and the Reconstruction amendments.<sup>354</sup> When neither of the major candidates in the 1876 presidential election had a majority in the Electoral College, the determination of who should be declared the winner of the election was referred to a special commission appointed by the House pursuant to its authority under the Twelfth Amendment.<sup>355</sup> After the commission split strictly along partisan lines to declare Rutherford Hayes the victor over Samuel Tilden, who had won the popular vote, it was not the Court but Hayes and Democratic leaders who brokered a compromise that allowed Hayes to serve a single term in exchange for ending Reconstruction.<sup>356</sup> In each of these events, non-judicial authorities negotiated compromises that comprise non-judicial precedents.

Non-judicial precedents settle other significant legal disputes as well. Some of the more familiar of these precedents are the determination that presidential power includes unilaterally removing executive officials, negotiating treaties, pardoning for any reason, and vetoing legislation on policy grounds; the House and Senate's respective understandings of the scope of their respective authorities in the federal impeachment process; the relevance of "senatorial courtesy" in judicial and other appointments; and the multiple ways in which Congress may authorize Presidents to wage war.<sup>357</sup>

### *B. Implementing Constitutional Values Redux*

A growing number of scholars are grappling with the impediments to imperfect constitutional implementation. Daryl Levinson, for example, argues that all constitutional rights are over-

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354. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 1-123 (2002) (noting Lincoln's firm resolve that "the rebelling Southern states remained . . . a part of the Union"); NICOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* 27-29 (2006) (discussing the preservation of the union and the abolition of slavery as the two main purposes of the Civil War); JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* 125-65 (2001) (explaining that Lincoln's call of 75,000 state militia into service to put down the insurrection after the surrender of Fort Sumter was too powerful to be blocked by judicial proceedings).

355. See WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876*, at 115 (2004).

356. WILLIAM A. DEGREGORIO, *THE COMPLETE BOOK OF U.S. PRESIDENTS: FROM GEORGE WASHINGTON TO GEORGE W. BUSH* 285-86 (2001).

357. See Whittington, *supra* note 2, at 804-12. While Whittington does not describe these extra-judicial interpretations as precedents, the ones he discusses have the distinctive features of non-judicial precedents which I have discussed, including discoverability.

and underenforced, which makes it “pointless and indeterminate” to speculate about the shape of the rights themselves.”<sup>358</sup> Although there is no empirical verification of Levinson’s point, it sounds plausible, given the impossibility of the Court’s policing perfect compliance with its decisions and the likelihood that the branches will not always fall squarely behind each other’s constitutional decisions. Richard Fallon argues that there may be “a [permissible] gap . . . between constitutional meaning and judicially enforced doctrine.”<sup>359</sup> He suggests the “best rationalizing explanation” of the gap is that some “background rights” may be properly “aspirational, embodying ideals that do not command complete and immediate enforcement.”<sup>360</sup> Fallon rejects Kermit Roosevelt’s assertions that courts may not ignore “background rights” and may have different reasons than non-judicial actors for underenforcing rights,<sup>361</sup> while Fallon and Levinson maintain that courts do not, as Roosevelt and Mitchell Berman claim,<sup>362</sup> decide cases first by identifying operative principles and then by crafting decision rules.<sup>363</sup>

Given short shrift in this discourse is the recognition that the perfect implementation of constitutional values depends on the interaction between judicial and non-judicial precedents. The problem is not just with non-judicial actors making comparative assessments about their relative competence to enforce certain norms or the costs associated with enforcing those norms. Sometimes, non-judicial actors directly oppose particular judicial precedents and take actions to undermine, rather than to facilitate, their implementation. For example, *Brown v. Board of Education* failed to be fully implemented, not because non-judicial actors decided that manageability costs outweighed the benefits of compliance with *Brown*, but rather because there were non-judicial precedents in the forms of traditions, customs, and norms that were so deeply entrenched in the South that they impeded the implementation of *Brown*’s full promise. Neither *Brown*

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358. Daryl Levinson, *Rights Essentialism and Remedial Equilibrium*, 99 COLUM. L. REV. 857, 924-26 (1999).

359. Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1317 (2006).

360. *Id.* at 1324-25.

361. See Kermit Roosevelt III, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193, 197 (2006).

362. See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 57-58 (2004); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655 (2005).

363. See Fallon, *supra* note 359, at 1316 (explaining that “courts do not customarily divide their analyses into two parts, one involving constitutional meaning and the other doctrinal design”).

nor its progeny could fully displace these precedents, much less be fully implemented without strong, lasting, and broad support from national political leaders.<sup>364</sup>

Similarly, Presidents Ronald Reagan, George H.W. Bush, and George W. Bush did not just underenforce *Roe v. Wade*; they tried to undermine it. They used all their prerogatives, including issuing executive orders withdrawing abortion services for military personnel, vetoing bills, supporting bills withdrawing financial support for abortion services, and appointing anti-*Roe* judges and Justices, to implement *their* judgment that *Roe* was a mistake.<sup>365</sup>

Non-judicial responses to *Brown* and *Roe* illustrate how non-judicial authorities, through the precedents they make, democratize the implementation of the Constitution. Non-judicial precedents are, in other words, an essential means through which the public is allowed some say over the implementation of constitutional values.

Congress's response to *INS v. Chadha*, in which the Court struck down the legislative veto—an arrangement in which one or both chambers of Congress or a legislative committee may override an executive action<sup>366</sup>—is illustrative. Dissenting in *Chadha*, Justice White lamented that the Court's decision to strike down the one-house legislative veto "sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'"<sup>367</sup> Yet, immediately after *Chadha*, an angry Congress began finding other ways to reassert its contrary views about the relationship between the executive and legislative branches, and in time, it turned the state of affairs back in the direction of the pre-*Chadha* world.<sup>368</sup> Through its active resistance to implementing *Chadha* fully, Congress reached a point of equipoise with the Court over their different positions on the constitutionality of legislative vetoes.<sup>369</sup> The ensuing state of equilibrium reflects how non-judicial actors, most of whom are politically accountable, bring to bear on the interpretive process their sensitivity to, and awareness of, public concerns and values.

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364. See KLARMAN, *supra* note 157, at 314-43.

365. See NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 43-52 (2004) (discussing how political leaders have influenced the doctrine on abortion rights and several other constitutional matters).

366. *INS v. Chadha*, 462 U.S. 919, 957-59 (1983).

367. *Id.* at 967 (White, J., dissenting).

368. See Louis Fisher, *Legislative Vetoes after Chadha* (Cong. Research Serv. Report for Cong., May 2, 2005) (counting more than 400 legislative vetoes enacted after *Chadha*).

369. See ESKRIDGE ET AL., *supra* note 205, at 787-800, 1036-39 (discussing the implications of social science research on equilibrium for understanding the strategic interaction of public institutions over questions of public law).

*C. The Counter-Majoritarian Difficulty in Perspective*

The equilibrium-producing interaction between judicial and non-judicial precedents also shows how non-judicial actors democratize constitutional law. In almost all constitutional adjudication, the question is not whether Justices will disregard majoritarian preferences, but *which* expressions of majoritarian preferences they will follow. In most constitutional cases, the Justices make decisions based on their constructions of different expressions of majoritarian preferences—constitutional text (ratified by a supermajority of states and still binding because of societal acquiescence), original meaning (whose authority depends on its being synonymous with the constitutional text), tradition (reflecting majoritarian preferences over time), customs or historical practices (reflecting how Presidents or members of Congress have understood their respective powers over time), and judicial precedents (reflecting what a majority of the Court says).

If so much of what the Court does can be explained as simply following some manifestation or reflection of majoritarian preferences, complaints about the counter-majoritarian difficulty in constitutional law are overstated. It is not credible to castigate many Court decisions as “counter-majoritarian,” when they are attempting to follow or reflect some expression of majoritarian preferences. Nevertheless, the counter-majoritarian difficulty is a genuine concern for two reasons.

First, the Court may misread, or follow the wrong expressions or manifestations of, majoritarian preferences. This complaint is raised about *Atkins v. Virginia*, in which the Court relied on “evolving standards of decency” to strike down a statute authorizing mentally retarded defendants convicted of certain crimes to be subjected to the death penalty.<sup>370</sup> The dissent in *Atkins* charged that “evolving standards of decency” is less concrete and therefore subject to easier manipulation than the tangible constitutional judgments of state authorities on point.<sup>371</sup> Similarly, in *Roper v. Simmons*, the Court relied on “the overwhelming weight of international opinion” to conclude that the Eighth Amendment prohibited states from using the death penalty against juvenile defendants who had been convicted of certain crimes,<sup>372</sup> even though “the overwhelming weight of

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370. 536 U.S. 304, 319-21 (2002).

371. See *id.* at 337-48 (Scalia, J., dissenting) (accusing the majority of failing to use objective factors to inform their judgment as to whether the punishment is consistent with “evolving standards of decency,” instead simply enforcing their own subjective judgment).

372. 543 U.S. 551, 578-79 (2005).

international opinion" hardly seems to be as relevant or authoritative in constitutional adjudication as the official judgments of state authorities. On the other hand, in *Lawrence v. Texas*, the Court struck down Texas's anti-sodomy law based on a societal consensus that it had identified against criminalizing sodomy, as reflected in the sharp decline from all fifty states criminalizing the conduct in 1961 to only thirteen doing so in 2003.<sup>373</sup> Here, the majority grounded its decision on the fact that most states—and most Americans—disapproved of such laws, and that there has been no significant effort to reinstate the laws overturned in *Lawrence* suggests the Court may not have been mistaken in its assessment of majoritarian preferences.

Second, the Court sometimes fails to follow *any* form of majoritarian preferences. In these cases, the Court is acting, at least subconsciously, as genuinely counter-majoritarian. For example, in *Furman v. Georgia*, the Court struck down all federal and state death penalty laws then on the books.<sup>374</sup> However, at least thirty-five states refused to follow *Furman* and had death penalty laws on the books, which went into effect when the Court overturned *Furman* a few years later.<sup>375</sup>

The point is not that judicial decisions are wrong because they fail to follow majoritarian preferences. Rather, judicial decisions deviating from concrete expressions of majoritarian preferences are more vulnerable to attack in the public sector and to the interposition of non-judicial precedents. The less concrete the form of majoritarian preferences in which judicial decisions are grounded, the more vulnerable they are to political attacks. Judicial decisions lacking any basis in concrete expressions of majoritarian preferences will face more difficulties than other precedents in being fully implemented and in developing the requisite network effects to be firmly entrenched in constitutional law.

Even without the prospect of judicial review, non-judicial actors follow a legal command that they find in some expression of majoritarian preferences. They will follow a democratic command that they deem authoritative. For instance, the directive in Article VI that "no religious test shall ever be required as a Qualification to any Office or public Trust under the United States"<sup>376</sup> depends on non-judicial authorities for its implementation. Many commentators and senators believed that President Bush violated this directive when he

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373. 539 U.S. 558, 573-99 (2003).

374. See 408 U.S. 238, 239 (1972).

375. See *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976).

376. U.S. CONST. art. VI.

acknowledged that he had nominated Harriet Miers to the Supreme Court based in part on her religious beliefs.<sup>377</sup> The President implicitly acknowledged his error by withdrawing the nomination and avoiding the defense of his next nomination on the same basis. Thus, the withdrawal of Miers's nomination and the subsequent successful defense of Samuel Alito's nomination on the basis of non-religious factors vindicated the constitutional commitment to the irrelevance of nominees' religious convictions to their fitness for public service.

### CONCLUSION

Shifting perspective from the Supreme Court to non-judicial actors will have several beneficial effects on the understanding and practice of constitutional law. First, non-judicial precedents have in common the basic characteristic of discoverability—they are past constitutional judgments or activities of non-judicial actors in which public authorities try to invest normative authority. They cover a more extensive range of decisions than judicial precedents do and are just as enduring. Moreover, they may be categorized by the institution that produces them, the powers through which they have been created, and whether they have been designed as binding or persuasive authority.

Second, historical practices, tradition, customs, and norms are different sets of non-judicial precedent to which courts defer in constitutional adjudication. Each of these concepts refers to past constitutional judgments of non-judicial actors that public authorities, including courts, have tried to invest with normative authority.

Third, courts are shaped by non-judicial precedents in the forms of choices made by non-judicial actors about their size, composition, jurisdiction, and funding. Non-judicial authorities decide which views to represent on the Court; they decide which judicial precedents to fortify and which to weaken through appointments.

Fourth, non-judicial precedents have limited force over time. Several factors limit the extent to which non-judicial precedents constrain subsequent constitutional decisionmaking, even in circumstances in which they initially are designed as binding authority. These factors include the absence of a complete or useful record for a substantial amount of constitutional activities outside the Court, the lack of candor in setting forth the bases for non-judicial actors' constitutional decisions, the different consequences of framing

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377. See, e.g., Editorial, *Faith and the Court*, N.Y. TIMES, Oct. 18, 2005, at A26; Leo Sandon, *Religious Tests for Public Office: Enough Already*, TALLAHASSEE DEMOCRAT, Nov. 5, 2005, at D1.



judgments as standards or rules, and the failure for there to be a point on which a stable majority of a legislature or collegial body agrees.

Fifth, non-judicial precedent performs many functions besides constraint. These functions include serving as a mode of constitutional argument; settling constitutional conflicts; facilitating public dialogues about the Constitution; implementing constitutional values; and shaping national identity, constitutional structure, and culture. Each of these functions demonstrates how law in the form of non-judicial precedent matters. In addition, the greater the network effects of precedents—the more often they are cited or followed and the more functions they perform—the more secure their meaning and value become.

Sixth, non-judicial precedents are instrumental for resolving some of the most difficult questions in constitutional law. For example, the prevalence, pervasiveness, and endurance of non-judicial precedents refute protests that judicial supremacy is a fact of our constitutional life. Non-judicial precedents settle at least as many, if not more, constitutional conflicts than do judicial precedents. Moreover, the fact that most of the Court's decisions are not counter-majoritarian, but are grounded in or follow some form of majoritarian preferences, demonstrates that the counter-majoritarian difficulty is not as pervasive in constitutional law as many scholars worry. The judicial precedents most likely to provoke the greatest resistance in the political process are those that are not grounded in such expressions or conflict with non-judicial precedents. In addition, imperfections, or incompleteness, in the implementation of constitutional values derive either from tensions between non-judicial and judicial precedents or the failure of non-judicial precedents to be grounded in some expressions or manifestations of majoritarian preferences.

Finally, it is impossible to understand constitutional law without appreciating the realm in which it is most extensively made—outside the Court—and the relationship between that domain and what the Court does. Shifting perspective from judicial to non-judicial precedent illuminates that the Court is supreme within a much narrower realm than that in which non-judicial precedents are made.

# The Constitutional Dimension of Immigration Federalism

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Clare Huntington

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*Although the federal government is traditionally understood to enjoy exclusive authority over immigration, states and localities increasingly are asserting a role in this field. This development has sparked vigorous debate on the propriety of such involvement, but the debate is predicated on a misunderstanding of the nature of federal exclusivity. Challenging the conventional wisdom that the Constitution precludes meaningful state and local involvement in immigration—a structural preemption argument—this Article argues that the Constitution allows immigration authority to be shared among levels of government. After establishing the correctness of this view of immigration authority, this Article argues that the constitutionality of state and local involvement should be assessed through the lens of traditional federalism values. A federalism lens does not necessarily validate any particular state or local regulation, but in lieu of the blunt tool of structural preemption, it is a far superior means for determining the proper allocation of immigration authority among levels of government and will lead to a more nuanced assessment of the interests at stake.*

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